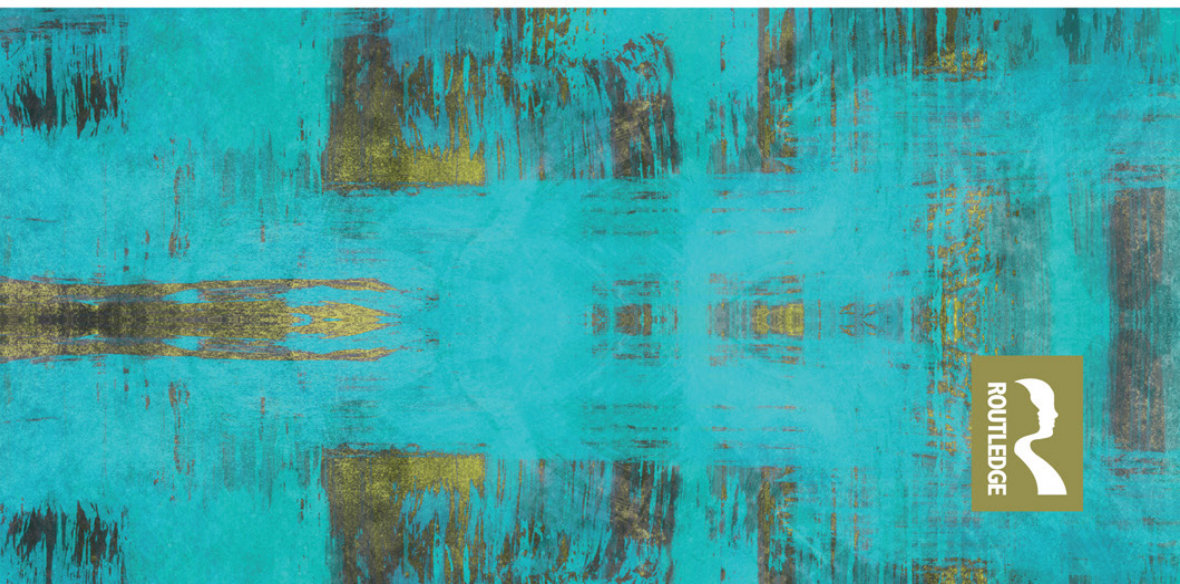
Routledge Research in International Law

THE INTERNATIONAL COURT OF JUSTICE AND MUNICIPAL COURTS

AN INTER-JUDICIAL DIALOGUE

Oktawian Kuc



The International Court of Justice and Municipal Courts

Recent decades have brought international and municipal courts much closer together and induced meaningful cooperation. This holds true also for the International Court of Justice and domestic judicial institutions as they engage actively in an inter-judicial dialogue, particularly on the normative level. Due to the impact of globalisation and internationalisation, the World Court has expanded its jurisprudence to also accommodate references and analysis of external judicial organs and their pronouncements. Likewise, ICJ decisions are referred to and consulted by municipal courts as authoritative statements of international norms or assistance in fact determination.

This monograph examines this inter-judicial dialogue in a comprehensive manner by identifying and analysing all its aspects as evidenced in respective jurisprudence. Surprisingly, the mutual conversation in judicial decisions between the World Court and national judicial institutions has drawn little attention from international legal scholarship, and the book is designed to fill this lacuna.

Oktawian Kuc, formerly a Legal/Policy Officer at the United Nations Office in Geneva, is an Assistant Professor at the University of Warsaw, Faculty of Law and Administration, and a practicing attorney admitted to the bar in Poland and New York State. He holds degrees from Harvard Law School (LLM) and the University of Warsaw (PhD in Public International Law, Master of Laws, Master in International Affairs). He was a Helton Fellow of the American Society of International Law as well as a DAAD Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

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Abbreviations

AJIL	American Journal of International Law
ASIL	American Society of International Law
ARSIWA	UN General Assembly, Resolution 56/83. *Responsibility of States for internationally wrongful acts*, 12 December 2001, UN Doc. A/RES/56/83, Annex, *Articles on Responsibility of States for internationally wrongful acts*
IV Geneva Convention	*Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Geneva, 75 UNTS 287
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Union, former European Court of Justice
ECOSOC	Economic and Social Council
EJIL	European Journal of International Law
European Convention	*Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Rome, 213 UNTS 222
fn.	Footnote
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICLQ	International and Comparative Law Quarterly
ICLR	International and Comparative Law Review
ICJ, Court, World Court	International Court of Justice
ICJ Rep.	ICJ Reports
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
ILDC	Oxford Reports on International Law in Domestic Courts
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea
J.	Journal

JICL	Journal of International and Comparative Law
JIL	Journal of International Law
LJ	Law Journal
LJIL	Leiden Journal of International Law
LR	Law Review
NATO	North Atlantic Treaty Organization
NYUJILP	New York University Journal of International Law and Politics
PCIJ	Permanent Court of International Justice
SA	South Africa
UK	United Kingdom
UN	United Nations
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
USA, US	United States of America
USSR	Union of Soviet Socialist Republics
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
YIL	Yearbook of International Law

Introduction

Recent decades have brought some profound changes in social relations, both locally and globally. After the end of the Cold War and the spectacular fall of the Soviet Union, the history of the world as we know it has unprecedentedly speeded up. The processes of globalisation have gained momentum in all fields of human activities: social, legal, political, economic, technical, and scientific. These changes brought States, nations, peoples, individuals, international organisations, and institutions much closer together, and consequently their relations on every level have intensified significantly. Today's world is interconnected and interdependent as never before.

This phenomenon could not fail to have had a bearing on the nature and basic characteristics of international law. In this regard, a quantitative and qualitative shift[1] has been identified in legal scholarship. The first one refers to a substantial and extensive proliferation of international regulations. The material scope of international rights and obligations has not only noticeably widened, but concurrently profoundly deepened. Also, the understanding of subjects of international law has undergone rather important modifications expending beyond States customarily possessing the monopoly in this regard. Even such a traditional and fundamental concept of State is now perceived differently, as States are no longer perceived as monoliths or monads. But globalisation brings even more developments. International law is in the process of perpetual and vibrant evolution. The wide-ranging overlay of norms of both national and international character is increasing. This naturally leads to overlap in the jurisdiction of domestic and international judicial bodies of different kinds. Within this process, an escalating number of matters, traditionally considered as internal affairs of each State, is now regulated at international level. "National legal systems consequently confront issues of international law to an unprecedented extent"[2]. Furthermore,

1 Nollkaemper A., *National Courts and the International Rule of Law*, Oxford University Press 2011, p. 7.

2 Guillaume G., *The Work of the Committee on International Law in National Courts of the International Law Association*, 3 International Law FORUM du droit international 34 (2001). Similarly, Ulfstein indicates that international law has entered areas that traditionally used to be reserved for State internal regulations, *see*: Ulfstein G., *The International Judiciary* [in:] *The Constitutionali-*

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noteworthily, individuals and private parties are granted certain rights within the international legal regime. Not surprising, these parties are keen and ready to secure their rights in judicial proceedings in different fora. Consequently, municipal courts are increasingly requested to examine and adjudicate upon questions of international law. Those disputes may also escalate to international level.

In this context, the importance of international dispute settlement mechanisms is greater than ever. In recent decades, novel tribunals have sprung up[3] encompassing within their jurisdiction such distinct areas of law as economic and criminal matters, human rights, and law of the sea issues. Moreover, new and old international tribunals, including the International Court of Justice, are facing an increasing number of cases being brought before them, with many being flooded with applications and complaints. It seems that the International Court of Justice, despite some criticism,[4] has been "exponentially busier" in recent decades as States are referring more and more contentious cases to be settled in The Hague.[5] Even more enthusiastic praise was expressed by Schulte stating that "[b]usiness is booming for the International Court of Justice (ICJ). Its prestige and activity have reached unprecedented heights".[6] Furthermore, the total record of effectiveness and compliance with ICJ decisions is rather positive.[7] There are only a few instances of open and wilful defiance by States, including the *Corfu Channel case*, the *Fisheries Jurisdictions cases*, the *Tehran Hostages case*, and the *Nicaragua case*.[8] Even in these cases, partial or even full compliance was finally accom-

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zation of International Law, eds. Klabbers J., Peters A., Ulfstein G., Oxford University Press 2009, p. 143.

3 Karen Alter reported that as of 2006, there have been 25 permanent international courts fully operational, 10 of which became operational in the 1990s and 9 in the 2000s, *see*: Alter K.J., *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, Northwestern University School of Law, Faculty Working Papers. Paper 212 (2012), available at: http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/212 (27.08.2015), pp. 2–3. Alford calls the proliferation of international tribunals "a profound change in international law and international relations", *see*: Alford R.P., *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 *Proceedings of the Annual Meeting (ASIL)* 160, 165 (2000).

4 Posner E.A., Yoo J.C., *Judicial Independence in International Tribunals*, 93 California LR 1 (2005); Aust A., *Advisory Opinions*, 1 J. International Dispute Settlement 123 (2010); Hubbard H., *Separation of Powers in the United Nations: A Revised Role for the International Court of Justice*, 38 Stanford LR 1 (Nov. 1985).

5 Llamzon A.P., *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EJIL 815 (2007), p. 818; Shahabuddeen M., *Precedent in the World Court*, Cambridge University Press 1996, p. 13n.

6 Schulte C., *Compliance with Decisions of the International Court of Justice*, Oxford University Press 2004, p. 1.

7 Paulson C., *Compliance with Final Judgments of the International Court of Justice since 1987*, 98 AJIL 434 (2004).

8 Schulte C., *supra* fn. 6, p. 271.

plished, but only after long periods of time. Thus, the World Court enjoys a "generally satisfactory compliance record".[9]

These significant changes have brought international tribunals and municipal courts closer together in exercising their judicial functions as both apply international law to international or transnational cases more often than ever before. This situation does not allow them to remain in the splendid isolation they used to enjoy, and in fact many judicial organs do recognise this momentous shift in relations between international and national adjudication. Under such circumstances, inter-judicial dialogue is gaining impetus and cutting through territorial and legal system boundaries. As the frontiers of the international and national spheres are becoming blurred, judicial activism reaches beyond the traditional limits and judges resolve to be more engaged in administering international law. It has already been indicated that municipal courts play an increasingly important role in international adjudication,[10] a role that many national lawyers, diplomats, and politicians still do not recognise or notice. In fact, domestic judicial bodies are in a position to enforce international law against its own executive or legislative organs, and they often do so. This also includes the review of acts of the government from the standpoint of international obligations. Furthermore, an important change in the attitude of national judges in relation to international law may be observed. They have displayed "in recent years a growing willingness to apply international law, including in cases involving governments and government officials".[11] According to Judge Higgins, the function of municipal courts, particularly those senior ones, should not be underestimated. "Their role is no longer to try to keep international law at arm's length … but to decide issues before them, which task now often entails an incidental determination of points of international law"[12] and "the handling of international law is treated as routine judicial work".[13] And the International Court of Justice assists significantly in this endeavour. Not only does it resolve particular disputes between parties, but also – if not mainly – it interprets and applies a highly uncodified, dispersed, complex, and ambiguous body of law, therefore shaping or even creating rules.

Many scholars acknowledge that nowadays international and domestic judicial institutions are partners in the common judicial enterprise.[14] They supplement, substitute, assist, and refer to each other while exercising their official functions.

9 *Ibid.*, p. 403.

10 Nollkaemper A., *Conversations among Courts: Domestic and International Adjudicators*, ACIL Research Paper 2013-08, p. 1 observes that specific roles of domestic courts shall be examined in relation to international tribunals and indicates four main fields in this regard: substitution, implementation, contestation, and normative development.

11 Shany Y., *Should the Implementation of International Rules by Domestic Courts Be Bolstered?* [in:] *Realizing Utopia. The Future of International Law*, ed. Cassese A., Oxford University Press 2012, p. 202.

12 Higgins R., *Changing Position of Domestic Courts in the International Legal Order* [in:] *Themes & Theories*, ed. Rogers P., Oxford University Press 2009, p. 1342.

13 *Ibid.*, p. 1343.

14 Slaughter A.-M., *A New World Order*, Princeton University Press 2004, p. 68.

It is not uncommon that judges of different systems and regimes study and know the jurisprudence of courts and tribunals from other jurisdictions, including the international one.

> The picture that emerges is one in which international law, on the one hand, increasingly reaches down to national courts, and on the other hand, many states and their courts increasingly reach up to allow international law to guide their judicial practices.[15]

Despite these profound and fascinating changes of international law generally and the position of international tribunals and municipal courts within the international community particularly, this subject has drawn slight attention from international legal scholarship. This conclusion is particularly true in relation to the inter-judicial dialogue between the International Court of Justice and municipal courts. This doctrinal lacuna has already been acknowledged and recognised by academia. Although there have been some passing references in a few articles and publications, "there is no monograph, at least in the English-speaking world that deals critically and systematically with the enforcement of international judgments in national courts"[16] for example. Similarly, the problem of the reception of the jurisprudence of the World Court and its decisions by domestic judicial institutions is not monographed and lacks "an established analytical framework".[17] One, and probably the only really comprehensive, analysis of municipal courts' responses to the jurisprudence of the International Court of Justice is the article authored by Reilly and Ordoňez[18] published back in 1996. Its main purpose was to examine "domestic case law to compare these differing responses and ascertain any emerging patterns to the reception of ICJ decisions".[19] However, due to the passage of 25 years and its limited scope, this study is already out-dated.

Consequently, the main purpose of this book is to examine whether inter-judicial dialogue between the International Court of Justice and municipal courts is in

15 Nollkaemper A., *supra* fn. 1, p. 7.

16 Oppong R.F., Niro L.C., *Enforcing Judgments of International Courts in National Courts*, 5 J. of International Dispute Settlement 344, 347 (2014), fn. 18. Similarly, Judge Bedjaoui observes that the compliance process with the decisions of ICJ "is a subject of capital importance – but one that is, paradoxically, disregarded or to some extent ignored or played down by legal writers", *see*: Bedjaoui M., *Address to Asian-African Legal Consultative Committee*, [1994–95] ICJ Yearbook 230; and Judge Jennings recognised that "the Court's business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards", *see*: Jennings R., *Contributions of the Court to the Resolution of International Tensions. Presentation* [in:] *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, eds. Peck C., Lee R.S., Martinus Nijhoff Publishers 1996, p. 78.

17 Reilly D.M., Ordonez S., *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 New York University JIL and Politics 435, 448 (1995–1996).

18 *Ibid.*

19 *Ibid.*, p. 435.

fact taking place. The hypothesis put forward by the present author is that actually the World Court and its domestic counterparts are already engaged in specific discourse and this judicial conversation is intensifying. Furthermore, the monograph aims at scrutinising different aspects of this phenomenon and providing some basic data as a further point of reference for future studies. Next, it is designed to address the problem of relationships between the Court and municipal judicial organs in a comprehensive and broad manner by identifying and analysing all aspects of the inter-judicial dialogue between these institutions. On the basis of collected statistics, the relevant classifications, categorisations, and systematisations are proposed.

Against this background, the main aspects of the inter-judicial dialogue between domestic judicial organs and the ICJ are discussed in separate chapters. Chapter 1 addresses the matter from the perspective of the World Court, as it discusses the role of decisions of municipal courts in the jurisprudence of the International Court of Justice. Then, the issue of the enforcement of ICJ decisions in national judicial proceedings is examined in Chapter 2 with the analysis of identified examples. Subsequently, Chapter 3 is dedicated to the reception of the case-law of the International Court of Justice by domestic courts. This process is particularly interesting and encouraging as it may be perceived as a real, deliberate and voluntary contribution of national judges to the common judicial enterprise in the area of international law. Lastly, the final conclusions are provided sketching reasons for the inter-judicial dialogue and providing some points for further research.

Before turning to the main body of the book, short explanations of some essential and fundamental terms used throughout the entire text are needed. The title of the monograph is *The International Court of Justice and Municipal Courts: An Inter-Judicial Dialogue*. The International Court of Justice, hereinafter also "the Court", "the World Court", or "the ICJ", is naturally "the principal judicial organ of the United Nations"[20] established by the UN Charter. The term "courts" shall be construed broadly as to encompass any institution created by law with the authority to hear and settle disputes on the basis of law. Thus, any judicial and *quasi*-judicial organ with prerogatives to review administrative actions is also perceived as a court for the purpose of this book. The adjective "municipal" refers to the legal regimes of States and is synonymous with domestic, national, or internal. Finally, the inter-judicial dialogue examined in this study is the process of engaging by one court with a decision or decisions of another. Thus, it is understood in its formal sense and connotates cross-citations, discussions, and references to other judicial pronouncements by a court in its decision. The informal dimension of the judicial dialogue consisting of the exchange of personnel, joint meetings, mutual participation in conferences, and seminars does not fall within

20 *Charter of the United Nations*, San Francisco, 24 October 1945, 1 UNTS XVI [UN Charter]. Art. 92.

the subject-matter of this book, but nevertheless shall be considered as an important factor or element of inter-judicial dialogue world-wide.[21] As the examination of the jurisprudence practice of the ICJ and of municipal courts focuses primarily and principally on judicial decisions, likewise this term shall be explained. A decision, or judicial decision, is any majority pronouncement or determination[22] of a court, either international or national. Consequently, the term "ICJ decision" means any ruling rendered in contentious or advisory proceedings and covers all types of judgments and orders as well as advisory opinions. Orders, however, are principally designed to address interlocutory matters of procedures; nevertheless occasionally they may also relate to substantive issues, particularly on indication of provisional measures. Thus, in this study, all judgments, advisory opinions, and orders on provisional measures shall mean decisions of the International Court of Justice.[23]

21 *See*: Fauchald O.K., Nollkaemper A.N., *Conclusions* [in:] *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, eds. Fauchald O.K., Nollkaemper A.N., Hart Publishing 2012, p. 348; Tzanakopoulos A., *Judicial Dialogue as a Means of Interpretation* [in:] *The Interpretation of International Law by Domestic Courts*, eds. Aust H. Ph., Nolte G., Oxford University Press 2016.

22 Bedjaoui M., *The Reception by National Courts of Decisions of International Tribunals*, 28 NYU-JILP 45, 46 (1996).

23 The exclusion of other interlocutory decisions is supported by their scope and content. A similar approach was adopted by: Schulte C., *supra* fn. 6, pp. 7–8 and 13–14.

1 Municipal courts' decisions in the jurisprudence of the International Court of Justice

The status of municipal judicial decisions in the jurisprudence of the International Court of Justice has not been so far a subject of particular scientific interest and research, either from the theoretical or the empirical perspective. Despite a few articles and chapters in this regard,[1] the most comprehensive study was that of Jenks,[2] addressing, however, a more general topic of the role of the municipal law in international adjudication. Furthermore, his monograph was published in 1964 and could not have considered the most recent jurisprudence of the World Court but rather analysed the case-law of the Permanent Court of International Justice and *ad hoc* arbitration tribunals. Consequently, there exists a lack of a complex and comprehensive study on the topic of municipal courts' decisions in the jurisprudence and practice of the International Court of Justice. Although in 1984 Rosenne concluded that the Court "has never cited an internal decision by name",[3] this constatation is not valid anymore. The ICJ quotes municipal rulings, refers to them, and examines and reviews their contents in the light of public international law. This change of attitude and the reasons behind it shall be closely scrutinised in this chapter.

The practice of the International Court of Justice indicates that it either refers to the municipal jurisprudence in a search for guidance from judicial institutions that have already addressed similar or analogous issues of international law or discusses domestic judicial decisions as facts, from which parties appearing before the Court infer certain legal consequences. In this context, procedural law, particularly in common law jurisdictions, traditionally recognises a distinction between

1 Nollkaemper A., *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5 Chinese JIL 301 (2006); Higgins R., *Changing Position of Domestic Courts in the International Legal Order* [in:] Higgins R., *Themes & Theories*, ed. Rogers P., Oxford University Press 2009; Higgins R., *National Courts and the International Court of Justice* [in:] *The Transformation of the Law. A Liber Amicorum for Lord Bingham*, eds. Andenas M., Fairgrieve D., Oxford University Press 2009.

2 Jenks C.W., *The Prospects of International Adjudication*, Stevens & Sons Limited 1964.

3 Rosenne Sh., *Practice and Methods of International Law*, Ocean Publications, Inc. 1984, p. 83.

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questions of law and points of facts.[4] The former relate to matters determined by applying or interpreting relevant legal rules and principles, while the latter are to be established based on evidence and facts deduced from the evidence. As in a municipal courtroom similarly on the international plane, judges are called upon to establish and assess the facts of a case and then consider their legal implications. Those are also two main judicial functions of the Court.[5] Consequently, this division between the questions of law and of fact is to be a major axis of discussion of the jurisprudence of the International Court of Justice in relation to municipal judicial decisions in this chapter. Additionally, the position of the World Court vis-à-vis municipal courts as well as its competence to scrutinise their pronouncements from the perspective of international law is discussed. Finally, the role of national adjudicators as underlined in the jurisprudence of the Court is presented.

At first, however, as introductory remarks, some general observations on the practice of reference to judgments of municipal courts in the case-law of the International Court of Justice as one of the aspects of their inter-judicial dialogue shall be made. All decisions rendered by the World Court between 1946 and 31 December 2020 have been scrutinised and among them 40 in total have been identified as decisions discussing municipal courts' rulings. Those include 28 judgments, 9 orders on provisional measures, and 3 advisory opinions (Figure 1.1). Judgments or orders were rendered in 31 contentious cases.

As of 31 December 2020, there have been 177 cases entered into the general list of the International Court of Justice,[6] and in 34[7] of these cases the Court issued at least one decision referring to or examining domestic rulings. This amounts to 19.2% of all cases considered by the ICJ. Furthermore, among the 12 cases still pending,[8] in 3 of them no material decision was rendered as of that

4 Amerasinghe Ch.F., *Evidence in International Law*, Martinus Nijhoff Publishers 2005, p. 50; Fumagalli L., *Evidence before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom* [in:] *International Courts and Development of International Law*, eds. Boschiero N., et al., T.M.C. Asser Press 2013, p. 143.

5 *Statute of the International Court of Justice*, San Francisco 26 June 1945, 33 UNTS 993 [ICJ Statute], Articles 36(2) and 53(2); International Court of Justice, *Rules of Court*, 2007 ICJ Acts & Documents No. 6, p. 91, last amendment 25 June 2020 [ICJ Rules], Articles 49(1), 79ter, 95(1) and 107(2).

6 Data available on the official website of the International Court of Justice: https://www.icj-cij.org/en/list-of-all-cases/introduction/desc (22.02.2021).

7 Altogether, the Court issued decisions discussing national rulings in 34 cases (both contentious – 31 – and advisory – 3) from the general list. The difference between the number of decisions and number of cases results from the fact that in one case the ICJ may render more than one decision, e.g. an order indicating provisional measures, a judgment on preliminary objections, and a judgment of merits.

8 The ICJ official website indicated that 14 cases were still pending as of 31 December 2020, although in two of them no procedural actions have been taken for a significant amount of time and judgments on merits were issued in 1997 in *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) Judgment, 1997 ICJ Rep 7 [*Gabčíkovo-Nagymaros Project case*] and in 2005 in *Armed Activities on the Territory of the Congo* (DRC v. Uganda), Judgment, 2005 ICJ Rep 168 [*DRC/Uganda case*]. Therefore, it is reasonable to conclude that only 12 cases were still pending.

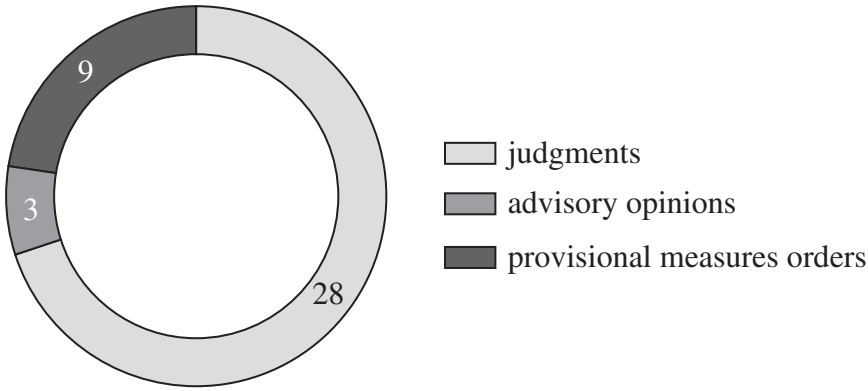

Figure 1.1 Decisions of the ICJ referring to municipal courts' rulings, by decision type.

date.[9] Additionally, 24 cases brought before the Court were discontinued without any material decision taken due to an applicant's unwillingness to carry on the proceedings.[10] It means that 22.7% of all cases in which any material decision was delivered by the ICJ[11] are those in which pronouncements discussing municipal courts' decisions were rendered. This figure is quite impressive, particularly in light of the fact that the majority of the Court's docket has traditionally been occupied by typical interstate disputes, *inter alia* boundary and maritime controversies.[12]

No decision with references to domestic judicial rulings was reported in the 1940s and the 1960s, but in the 1950s six pronouncements of the International Court of Justice were identified (Figure 1.2). Starting from the 1970s, a constant increase in references to judicial decisions originating from domestic jurisdictions is easily observed with an extraordinary peak in the decade of the 2000s with 16 decisions rendered by ICJ mentioning municipal rulings. This gives 1.6 rulings per year. Then, although a little lower, the number of ICJ decisions discussing municipal rulings remains significantly high in the 2010s. This means one decision per year, a rate maintained also in the year of 2020.

9 Out of 12 pending cases categorised as still pending, in six of them a judgment on preliminary objections was rendered. In an additional three cases the Court decided on the request on the indication of preliminary measures, but no judgments have been issued so far. In the remaining three cases, only an order on time-limits for submitting relevant pleadings was delivered. Consequently, in those three cases no substantive decision has been issued.

10 ICJ Rules, Art. 89.

11 One hundred and seventy-seven cases on the general list minus 3 cases still pending with no material issued minus 24 cases discontinues without any material decision rendered gives 150 cases.

12 At least 41 cases considered by the Court or still pending focus on border or maritime disputes as well as on the maritime zone demarcation.

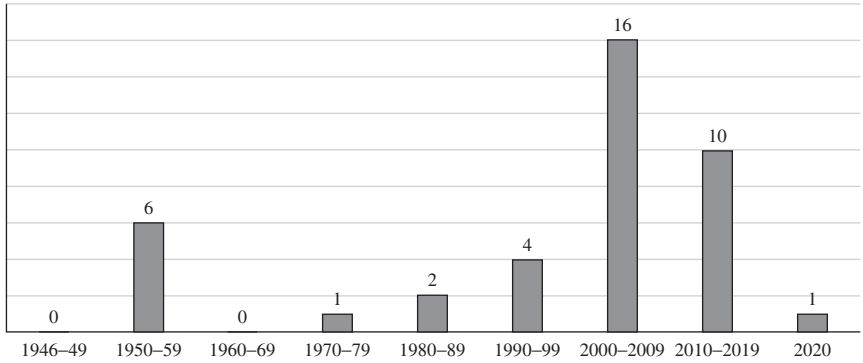

Figure 1.2 ICJ decisions with reference to municipal judicial rulings, by decade.

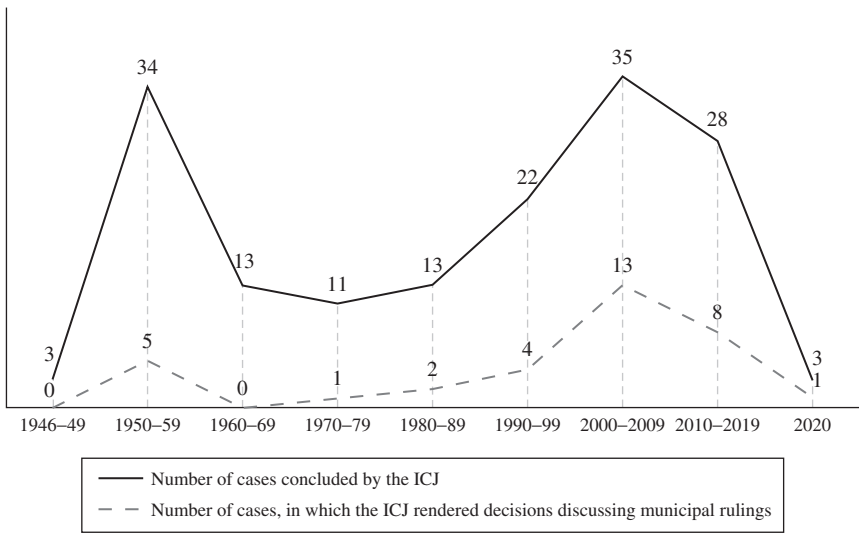

Figure 1.3 Number of cases in which the ICJ rendered decisions discussing municipal rulings in relation to overall cases concluded by the ICJ, by decade.

When data on the number of cases in which at least one decision was rendered discussing a municipal judicial decision are juxtaposed with the number of all cases concluded so far by the International Court of Justice,13 it may be concluded that these two variables are directly correlated (Figure 1.3). Consequently, the more cases are brought before the ICJ for adjudication, the more frequently

13 Data available on the ICJ official website: https://www.icj-cij.org/en/list-of-all-cases/culmination/desc (22.02.2021). Figure 1.3 does not take into account 12 cases pending before the ICJ as they have not yet been concluded.

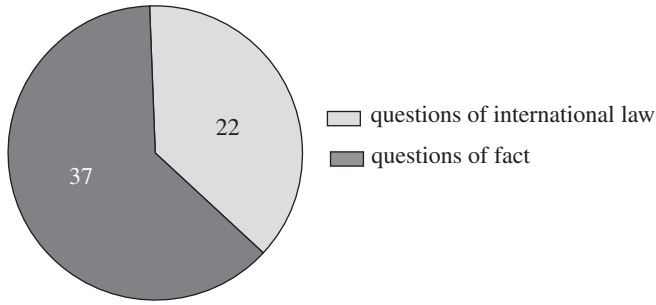

Figure 1.4 Reasons for discussing municipal courts' decisions by the ICJ.

municipal courts' decisions are discussed in its pronouncements. Nevertheless, the number of cases referring to or examining domestic rulings in the decade of the 2000s is disproportionally higher than in any previous decade. This anomaly may be attributed to the fact that during that period the World Court was requested an unprecedented number of times to assess the conduct of municipal courts vis-à-vis State international obligations.14 Additionally, in the last three decades (1990–2019) 85 cases were concluded, and in 25 of them decisions discussing municipal courts' decisions were issued. Thus, the ratio between the latter and the former amounts to 29.4%. This means that in almost 30% of its cases concluded starting from the year 1990, the International Court of Justice referred to or examined national judgments or orders. When the ten cases discontinued during the last three decades are taken into account, the ratio is even higher: 33.3%.

Analysing the reasons and contents of the reference and discussion of municipal courts' decisions by the International Court of Justice in its jurisprudence, domestic rulings are of assistance to the Court either in addressing questions of international law necessary to resolve inter-state differences or in tackling with questions of fact. Thirty-seven instances of the former and 22 of the latter references to national judicial organs' decisions have been identified15 (Figure 1.4).

Concerning the question of international law reference (Figure 1.5), seven types of those references are identified. Consequently, domestic rulings are discussed by the International Court of Justice (i) to facilitate a treaty interpretation, (ii) to assist in the identification of a customary rule of international law,

14 For example, such cases were decided by the Court in that period: *LaGrand case*, *Avena case*, *Arrest Warrant case*, *Certain Property case*, and *Criminal Mutual Assistance case*.

15 It needs to be borne in mind that a particular decision of the ICJ may discuss municipal rulings for different reasons and, therefore, fall within more than one proposed category. Thus, the cumulative number of references to domestic rulings by the ICJ will not amount to 40 decisions indicated at the beginning of this chapter.

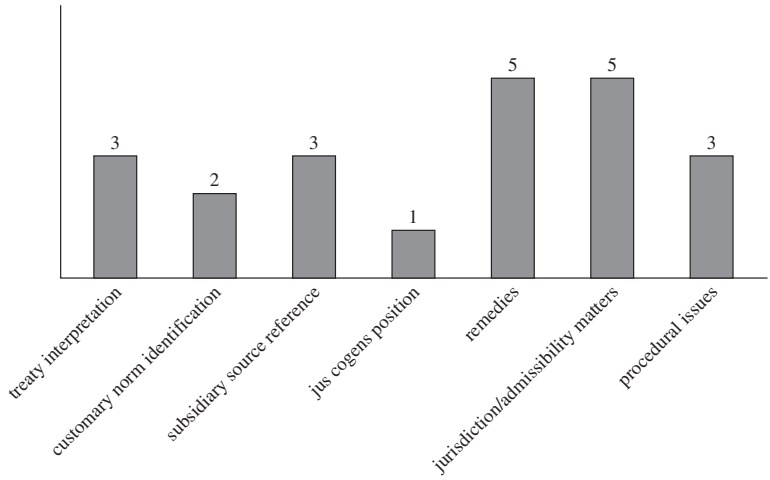

Figure 1.5 ICJ reference to municipal courts' decisions to address questions of international law.

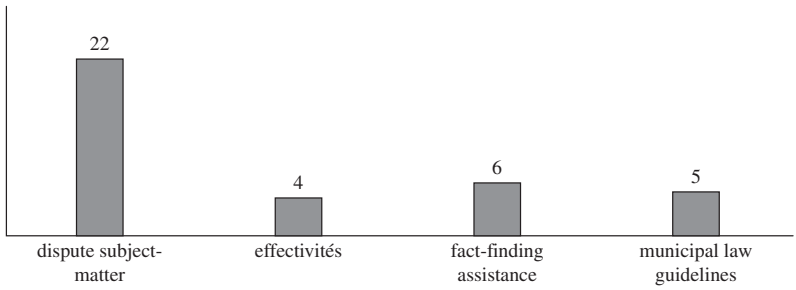

Figure 1.6 ICJ reference to municipal courts' decisions to address questions of fact.

(iii) as a subsidiary source of international law, (iv) to clarify the position of *jus cogens* in relation to other norms of the international legal regime, (v) to provide a guideline for adequate remedies redressing an international wrongful act, (vi) to aid in determining the jurisdiction of the Court or the admissibility of parties' submissions, or finally (vii) to illuminate some procedural matters. Each type is discussed in detail in the following pages.

Similarly, the discussion of municipal judicial decisions by the ICJ in relation to questions of fact may be categorised into four different types (Figure 1.6). First and foremost, these national decisions may constitute a subject-matter of a dispute or a major element of such a dispute. They may also be an expression of State conduct, particularly in a form of *effectivités* material in territorial disputes. Domestic courts' rulings assist the World Court in its fact-finding function, as factual

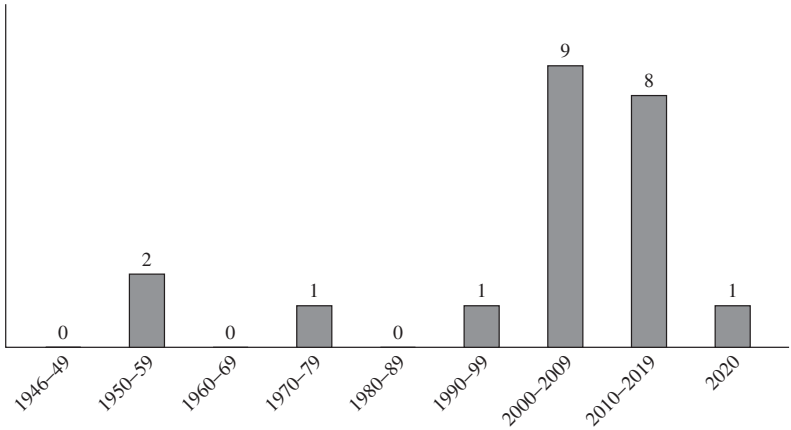

Figure 1.7 Municipal courts' decisions as a dispute subject-matter before the ICJ, by decades.

determinations from the national level are sometimes assessed and adopted on the international plane. Finally, they provide guidelines concerning the interpretation and application of municipal law in respective jurisdictions.

When the reference of the International Court of Justice to a municipal judicial pronouncement as a dispute subject-matter is considered, judicial decisions coming from national jurisdictions only recently have come into the purview of the Court's scrutiny in a significant number (Figure 1.7). Undoubtedly, the decade of the 2000s was unprecedented in this regard in comparison to previous decades. Nevertheless, this phenomenon does not seem to be only an exception as almost the same result is visible in the years 2010–19. Interestingly, in many instances a decision of the ICJ considers more than one national ruling, mostly an entire series of judgments and orders originating from domestic adjudicators.

The present chapter indicates that a dialogue between the International Court of Justice and municipal courts from the perspective of the World Court does indeed exist, even if to a limited extent. On one hand, the ICJ firmly expresses its competence to examine and adjudicate upon the compatibility of domestic judicial decisions and procedures with international legal standards and obligations. On the other hand, it recognises the autonomy and capacity of municipal judiciaries and is reluctant to step into their sphere of competence. Starting from the decade of 2000, the Court has expanded its jurisprudence to accommodate references and analysis of external judicial organs and their pronouncement. This holds true for arbitral cases16 and even more so for domestic rulings. This acceleration is mainly attributed to the significant increase in cases with subject-matter

16 Pellet A., *Article 38* [in:] *The Statute of the International Court of Justice. A Commentary*, eds. Zimmermann A., et al., 2nd ed., Oxford University Press 2012 [*ICJ Statute Commentary*], p. 859.

directly referring to the practice and decisions of national courts. At the same time ICJ's references to domestic case-law for assistance in reconstructing the content and scope of international law have remained not so frequent,17 but significant. For example, the World Court was willing to delve into a complex and lengthy discussion of domestic courts' decisions as indicative of the state of customary law in the *Jurisdictional Immunities case*,18 something unprecedented and absent in previous years.

The significance of domestic courts on the international plane and within the Court's jurisprudence may be ascribed to the fact that both the ICJ and municipal courts are judicial organs established to administer the same realm of law, foster the rule of law, and develop the reason of law. As they function in similar conditions and share comparable problems and challenges, while in different legal regimes, diverse political and social settings, and with structural-organisational dissimilarities, their core judicial function destines both national courts and international tribunals to look upon each other as partners and allies, rather than rivals. This undoubtedly has contributed to the greater deference to national judicial organs shown by the ICJ in its recent decisions. The International Court of Justice respects and takes advantage of the fact-finding determination function of municipal courts and at the same time refrains from divagating from municipal law interpretation and application adopted by those courts. It recognises their capacity to resolve matters of international law.

The inter-judicial dialogue is also strengthened by providing guidelines to municipal courts by the ICJ in matters of international law. Similarly, the Court recognises the role of domestic adjudicators within the international judicial system, particularly in the implementation of its decisions and guaranteeing compliance. In the *Avena case*,[19] the ICJ preferred to refer the review and reconsideration process to courts of the United States. Additionally, the reach of its rulings has been expanding recently as their operative parts do refer directly to State organs and specify their obligations, encompassing also municipal courts.[20] This development of decomposing the unitary image of a State (or piercing the veil) is aimed at securing greater compliance with the decisions of the World Court. In order to analyse and assess this phenomenon in its entirety, the case-law of the International Court of Justice needs to be confronted with the practice of municipal courts that may be or are addressees of its rulings. The next two chapters will examine this aspect of the inter-judicial dialogue.

17 Nollkaemper A., *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5 Chinese JIL 301, 310 (2006).

18 *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, 2012 ICJ Rep. 99 [*Jurisdictional Immunities case*].

19 *Avena and Other Mexican National* (Mexico v. USA), Judgment, 2004 ICJ Rep. 12 [*Avena case*].

20 Sossai M., *Are Italian Courts Directly Bound to Give Effect to the Jurisdiction Immunities Judgment?*, 21 Italian YIL 175, 178 (2011).

1.1 Questions of international law and municipal jurisprudence

The presentation of the reliance of the International Court of Justice on municipal courts' decisions to address matters of international law follows the traditional list of international law sources enumerated in Article 38 of the ICJ Statute. Thus, in the first instance, the role of domestic rulings in relation to the treaty interpretation is discussed. Later, the Courts' examination of the existence, scope, and contents of customary international rules is reviewed in the light of municipal rulings. Furthermore, according to Article 38(1)(d) of the ICJ Statute, judicial decisions are subsidiary sources of international law and their status as such in the ICJ jurisprudence is scrutinised. Besides, while considering *jus cogens* norms, the World Court in a few instances relied on domestic judicial institutions; hence these instances are examined, even though pre-emptive norms do not constitute a separate source of international law *per se*. Their special status under international law warrants, however, their separate discussion. Finally, national judicial decisions have also been of assistance to the Court in resolving more technical and procedural matters deemed as *quaestio juris*. This relates specifically to issues pertaining to the jurisdiction of the ICJ, the admissibility of claims presented by applicants, remedies under international law, and other similar matters.

1.1.1 Municipal courts' decisions and interpretation of treaties

The interpretation of international agreements is a main judicial function of the Court, pursuant to Article 36(2)(a) and 38(1)(a) of the ICJ Statute. The fulfilment of this substantial task does not require reference to any additional authority besides the text of the convention in question interpreted in accordance with directives envisaged in the *Vienna Convention on the Law of Treaties*.[21] Nevertheless, in certain situations the World Court relies on conclusions reached by municipal judicial organs in order to strengthen and support its own interpretation of a particular treaty.

In its *Wall Advisory Opinion*,[22] the International Court of Justice found it necessary to determine the rules and principles of international law governing the issue sought by the UN General Assembly to be resolved by the ICJ. One of the most important bodies of law relevant to the legal consequences of the erection of a wall in the occupied Palestinian territories is international humanitarian law, particularly the IV Geneva Convention. Israel expressed its understanding that the IV Geneva Convention shall not be applicable *de jure* to the occupation of Palestinian territory due to "the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt"[23] and, consequently, not forming

21 *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, 1155 UNTS 331 [VCLT], Art. 31–33.

22 *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion, 2004 ICJ Rep. 136 [*Construction of a Wall Opinion*].

23 *Wall Advisory Opinion*, ¶ 90.

a territory of a Party to the Convention. The main task of the Court was, therefore, to interpret Article 2 of the IV Geneva Convention governing its applicability. Having in mind the interpretative directives of Article 31 of VCLT, the ICJ examined firstly the ordinary meaning of the provision in question in light of its object and purpose supported by *travaux préparatoires*, later to proceed with the subsequent State practice, the stance of the International Committee of the Red Cross, the UN General Assembly, and Security Council resolutions, finally reaching a judgment of the Supreme Court of Israel issued on 30 May 2004. A passage from this was cited in the ICJ judgment. Based on these considerations, the Court concluded,

> the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories.[24]

The *Jurisdictional Immunities case* provides another instance of ICJ recourse to national jurisprudence for assistance in interpreting treaties. While considering the Italian argument that the territorial tort principal forms part of international customary law, the Court had to consider whether such an exemption from the State immunity rule exists in relation to acts of armed forces. This particular issue was confronted with the relevant provisions of the *European Convention on State Immunity*,[25] Articles 11 and 31 – particularly their scope and interlinkage. The conclusions reached by courts in Belgium (the Court of First Instance of Ghent in *Botelberghe v. German State*), Ireland (the Supreme Court in *McElhinney v. Williams*), Slovenia (the Constitutional Court in case no. Up-13/99), Greece (the Special Supreme Court in *Margellos v. Federal Republic of Germany*), and Poland (the Supreme Court in *Natoniewski v. Federal Republic of Germany*) on this point led the World Court to the determination that the territorial tort principle does not apply to the conduct of armed forces.[26]

Finally, in the *Aut dedere aut judicare case*,[27] the ICJ relied on judgments of the Dakar Court of Appeal in *Public Prosecutor's Office and François Diouf v. Hissène Habré* and the Senegalese Court of Cassation in *Souleymane Guengueng et al. v. Hissène Habré* to conclude that the crime of torture shall be prosecuted on the basis of universal jurisdiction as required by the Torture Convention[28] and

24 *Ibid.*, ¶ 101.

25 *European Convention on State Immunity*, Basle, 16 May 1972, 1495 UNTS 182.

26 *Jurisdictional Immunities case*, ¶ 68.

27 *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, 2012 ICJ Rep. 422 [*Aut dedere aut judicare case*].

28 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984, 1465 UNTS 85 [Torture Convention].

necessary domestic implementations shall be adopted in order to fulfil State obligations deriving from this Convention.[29]

1.1.2 Municipal courts' decisions and determination of customary rules

Under international law, the existence of a customary rule requires two mandatory elements: a settled State practice and *opinio juris* or "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[30] Municipal decisions may play a pivotal role in relation to asserting those two elements. As State organs, they provide undeniable evidence of a State practice in a particular field.[31] Moreover, domestic rulings may be considered *per se* expressions of *opinio juris*. Municipal courts as courts of law are bound to adjudicate on the basis of rule of law, whether national or international. In exercising their judicial functions, domestic adjudicators are required by their national legal systems to act within and base their conclusions only on law. Consequently, it is inherent in municipal rulings to be rendered with the perception of acting within the legal scope of authority. Moreover, in the era of globalisation, domestic courts are frequently requested to determine issues of international law. In certain fields, like in the field of immunities, they have created "a substantial body of national jurisprudence".[32]

Concerning the practice of the ICJ in determining the existence of a customary rule through consulting municipal courts' decisions, a first example of such a reference may be found in the *Arrest Warrant case*.[33] In this dispute between the Democratic Republic of Congo and Belgium, the Court needed to address the matter of exceptions to diplomatic immunity under customary international law. The ICJ directly based its reasoning first and foremost on the careful examination of State practice, including national statutory law and decisions of higher courts. It consulted the House of Lords *Pinochet case* and the *Qaddafi case* from the French Court of Cassation as well as a few other pronouncements of national higher courts, unfortunately not indicated by name. Only later did it proceed to "the legal instruments creating international criminal tribunals" (the Nuremberg

29 *Aut dedere aut judicare case*, ¶ 76.

30 *North Sea Continental Shelf* (Germany v. Denmark; Germany v. the Netherlands), Judgment, 1969 ICJ Rep. 3 [*North Sea Continental Shelf cases*].

31 In the past, there have been voices within the international legal scholarship that national judicial decisions shall not be regarded as State practice in the process of identifying a rule of customary international law. This approach is "universally discredited", *see*: Akehurst M., *Custom as a Source of International Law* [in:] *Sources of International Law*, ed. Koskenniemi M., Ashgate 2000, pp. 259–60.

32 Higgins R., *Changing Position of Domestic Courts in the International Legal Order* [in:] Higgins R., *Themes & Theories*, ed. Rogers P., Oxford University Press 2009, p. 1341.

33 *Arrest Warrant of 11 April 2000* (DRC v. Belgium), Judgment, 2002 ICJ Rep. 3 [*Arrest Warrant case*].

Tribunal, the Tokyo Tribunal, ICTY, ICTR, and ICC) and international tribunals decisions.[34] The World Court concluded, however, that it was

> unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[35]

Three judges in their joint separate opinion provided even more extensive examination of State practice in the form of municipal courts' decisions on the issue being brought before the ICJ.[36]

Nevertheless, the first comprehensive and complex examination of State practice, including municipal jurisprudence, in relation to the formation, contents, and scope of customary rules under international law, was undertaken in the *Jurisdiction Immunities case*. This is probably the only judgment of the ICJ in which domestic court's decisions played such a vital, predominant, and substantial role, as no other source of international law was mentioned so extensively in so many parts of the judgment. The International Court of Justice was requested to determine whether Germany was entitled to jurisdictional immunity in Italian courts as a matter of customary law in relation to acts performed during the Second World War by its armed forces on Italian soil. Symptomatically, the ICJ primarily concentrated on the municipal courts' practice that assisted it in determining the contents, limitations, and exceptions to customary rule on State jurisdictional immunity. The final outcome of this determination was that "[i]n the Court's opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings".[37]

Before reaching this conclusion, the ICJ preceded with the scrutiny of State practice in stages, starting with the most general question and moving forward to more detailed and specific ones. Firstly, it concluded that "States are generally entitled to immunity in respect of *acta jure imperii*" as is evident *inter alia* in the jurisprudence of national courts.[38] The Court, nevertheless, did not name any particular court or case at this stage. This may be attributed to the fact that both parties expressed common understanding of this general rule. Secondly, the ICJ accepted the notion that the State immunity rule is subject to certain exceptions under customary international law. One of them relates to civil proceedings concerning acts taking place on the territory of a forum State resulting in death,

34 *Arrest Warrant case*, ¶ 58.
35 *Ibid.*
36 *Ibid.* (Judges Higgins, Kooijmans & Buergenthal, sep. op.).
37 *Jurisdictional Immunities case*, ¶ 77.
38 *Ibid.*, ¶ 61.

personal injury, or property damage in the course of traffic accidents and other "insurable risks".[39] The example cited concerned the Supreme Court of Austria judgment in *Holubek v. Government of the USA*. Further, the World Court examined the practice of national courts "regarding State immunity in relation to the acts of armed forces".[40] It relied on decisions from Egypt (*Bassionni Amrane v. John*), Belgium (*S.A.Eau, gaz, électricité et applications v. Office d'aide mutuelle* from the Brussels Court of Appeal), Germany (*Immunity of the United Kingdom* from the Court of Appeal of Schleswig), the Netherlands (the Supreme Court in *USA v. Eemshaven Port Authority*), France (*Allianz Via Insurance v. USA* from the Court of Appeal in Aix-en-Provence), Italy (*FILT-CGIL Trento v. USA* from the Court of Cassation), the United Kingdom (the Court of Appeal in *Littrell v. USA* and the House of Lords in *Holland v. Lampen-Wolfe*), and Ireland (the Supreme Court in *McElhinney v. Williams*) to declare that

> these judicial decisions, which do not appear to have been contradicted in any other national courts judgments, suggest that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State.[41]

Then, the ICJ addressed an even more specific question on jurisdictional immunities of States in proceedings concerning acts committed by armed forces during armed conflicts and again analysed the practice of States as envisaged in municipal judicial decisions. The Court directly discussed jurisprudence from France (the *Cour de cassation* in cases *Bucheron*, *Grosz*, and *X*) as well from Slovenia (case no. Up-13/99 heard by the Constitutional Court), Poland (the Supreme Court of Poland in *Natoniewski v. Federal Republic of Germany*), Belgium (the Court of First Instance of Ghent in *Botelberghe v. German State*), Serbia (the Court of First Instance of Leskovac), Germany (the Federal Supreme Court in *Greek Citizens v. Federal Republic of Germany*), and Brazil (the Federal Court in Rio de Janeiro in *Barreto v. Federal Republic of Germany*). It stressed that their factual background was very similar to Italian cases directly under the Court's scrutiny in the *Jurisdictional Immunities case*.[42] Interestingly, while referring to the Polish Supreme Court's judgment, the Court did not confine itself to stating the conclusion reached by that court on the question of State immunity and its application to armed forces' conduct in the course of an armed conflict, but additionally presented legal authorities, which assisted the highest Polish judicial authority to reach its conclusion.

Italy also presented the argument that State immunity does not apply to grave breaches of international humanitarian law (war crimes), crimes against humanity,

39 *Ibid.*, ¶ 64.
40 *Ibid.*, ¶ 72.
41 *Ibid.*
42 *Ibid.*, ¶ 73–4.

and serious violations of international human rights, those focusing on the gravity of alleged violations. Nevertheless, the International Court of Justice did not share this reasoning, as it stressed that the customary international law rule of State immunities did not correlate in any way with the aforementioned gravity. This conclusion has been reached based on "a substantial body of State practice" and "[t]hat practice is particularly evident in the judgments of national courts".[43] Again, cases from several jurisdictions were referred to: Canada (*Bouzari v. Iran* from the Court of Appeal of Ontario), France (the Court of Appeal of Paris and *Cour de cassation* in the *Bucheron*, *X*, and *Grosz cases*), Slovenia (the Constitutional Court in case no. Up-13/99), New Zealand (the High Court in *Fang v. Jiang*), Poland (the Supreme Court in *Natoniewski*), and the United Kingdom (the House of Lords in *Jones v. Saudi Arabia*).[44]

In relation to measures of constraint taken against German property in Italy, the ICJ emphasised the existence of State immunity of enforcement that may be overcome only when one of the following conditions is met: the property is used for non-governmental purposes, the State entitled to such immunity consented to a measure of constraint, or the property has been assigned by the State for satisfaction of a claim. "[A]n illustration of this well-established practice" has been evident in decisions of the German Constitutional Court (BVerfGE, Vol. 46, p. 342), the Swiss Federal Tribunal in *Kingdom of Spain v. Société X*, the House of Lords in *Alcom Ltd. v. Republic of Colombia*, and the Spanish Constitutional Court in *Abbott v. Republic of South Africa*.[45]

Finally, the Court discussed a matter concerning the enforcement of foreign judgments within the territory of a forum State. It reached the conclusion, consulting also with decisions of the Supreme Court of Canada in *Kuwait Airways Corp. v. Iraq* and the UK Supreme Court in *NML Capital Limited v. Republic of Argentina*, that once a national court is confronted with a request for *exequatur*, it needs to examine whether, in case the same dispute is brought before it for adjudication, a respondent State would be entitled to immunities under international law.[46] If the answer to such a question is affirmative, then the request shall be dismissed.

Although the State practice in the *Jurisdictional Immunities case* has been described and examined at length and in considerable detail, the Court's dealing with the second criterion for the existence of customary rule – *opinio juris* – is rather disappointing. It was only highlighted in one sentence that "[t]hat practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity".[47]

43 *Ibid.*, ¶ 84.
44 *Ibid.*, ¶ 85.
45 *Ibid.*, ¶ 118.
46 *Ibid.*, ¶ 130.
47 *Ibid.*, ¶ 77.

Nevertheless, this short consideration by the ICJ may indicate that in any instance, when a domestic court is applying a norm it considers to be a rule of customary international law, *opinio juris* is present and no additional determination is necessary. This might lead to the conclusion that any proof of State practice attributed to a judicial department of a government *per se* carries a mandatory subjective element of a customary rule. This element is, thus, a conviction that a domestic judicial ruling has been rendered as law so requires.[48]

1.1.3 Municipal courts' decisions as subsidiary sources of international law

Pursuant to Article 38 (1)(d) of the ICJ Statute, judicial decisions constitute "subsidiary means of the determination of rules of law". This phrase alone has initiated many academic disputes in the field of sources of international law, but neither a clear nor self-evident interpretation has been provided so far in scholarship nor has the Court addressed this matter in any of its decisions by indicating its own understanding of the status of judicial decisions as subsidiary sources. To reconstruct the meaning of the notion, the scope and contents of Article 38(1)(d) of the ICJ Statute shall be addressed. Firstly, all judicial decisions, not only international ones, are referred to as subsidiary means for the determination of international law.[49] Therefore, municipal courts' decisions definitely fall within the purview of the provision.[50] Secondly, the understanding of the phrase "determination of rules of law" proposed by Borda deserves thoughtful consideration. He explains that the phrase should be construed in the light of two interlined notions of "a verification of the 'existence' and 'state' of rules of law at the relevant time"

48 Francioni F., *International Law as a Common Language for National Courts*, 36 Texas ILJ 587, 593 (2001) points to "the decisive role that national courts can play in establishing the fundamental element of *opinio juris*" and explains that "[*o*]*pinio juris* is required, and this element can find source and evidence in reasoned decisions given by courts which are familiar with comparative jurisprudence. Their independence and the need to explain the legal foundation of any given judgment is a better guarantee of *opinio juris* then the self-judging statement of the executive branch". Furthermore, already in 1929 Lauterpacht observed that "[*o*]*pinio juris* is the central requirement of custom, and it is in judicial decisions that this condition can be fulfilled in the international sphere in a spirit of detachment and impartiality free from considerations of immediate and important interests of states", *see*: Lauterpacht H., *Decisions of Municipal Courts as a Source of International Law*, 10 British YIL 65, 82–3 (1929).

49 Ehrlich L., *Prawo narodów*, wyd. 2, K.S. Jakubowski 1932, p. 83.

50 Nevertheless, some scholars do not agree with such a notion and limit the meaning of "judicial decisions" only to international ones, *see*: Pellet A., *Article 38* [in:] *The Statute of the International Court of Justice. A Commentary*, eds. Zimmermann A., et al., 2nd ed., Oxford University Press 2012 [*ICJ Statute Commentary*], p. 862. Such interpretation would run counter to the ordinary meaning of the provisions of Article 38 and would be against the predominant practice of both the ICJ and other international tribunals, seeing in Article 38 a list of sources of international law that also encompasses domestic judicial decisions.

and "a verification of the 'proper' (or 'accurate') interpretation of rules of law"[51] in relation to the subsidiary character of judicial rulings. Thus, Article 38 does not indicate the inferior character of judicial decisions in relation to other, traditional sources of international law but rather shifts the focus to the process of reconstructing an international legal norm by international tribunals. In fact, Bord argues that Article 38(1) contains not one, but two distinctive lists. The first one names three "law-creating processes" – treaty norms, customary norms, or general principles of law – or formal sources of international law, and the second included in Article 38(1)(d) expresses two "law-determining agencies" of rules from the first list.[52] Therefore, judicial decisions are not to be understood as separate sources of international law, but rather as middlemen. Each court or tribunal established to apply international law in order to ascertain international rules to be applied – either customary or conventional – may, by itself, first-hand examine State practice or exercise a direct interpretation of a treaty. These would be the principal means of international norm verification. Or, due to scarce resources, in consideration of the effectiveness and speediness of proceedings or other substantial reasons, such a tribunal may supplement or substitute this direct examination by reliance on a second-hand determination of an international norm originating from an external actor – either a judicial organ or a learned scholar. Such courts' decisions and teachings of academics form the subsidiary sources of international law.

In this context, judicial decisions may be also called "documentary sources"[53] confirming the existence of expressed rules and principles of international law catalogued in Article 38(1)(a), (b), and (c). Hence, strictly speaking, a tribunal does not apply those subsidiary means but rather rules that are through them determined. Nevertheless, this theoretical introduction has little bearing on any practical application of international law. International courts rely on judicial decisions while ascertaining international rules almost in the same manner as they do on treaty provisions. Whether it is a matter of convenience or necessity, it is hard to conclude definitively. As far as the International Court of Justice is concerned, it heavily refers to judicial decisions – first and foremost to its own jurisprudence or its predecessor's. In the *Wall Advisory Opinion* itself, the ICJ included 28 cross-references to its previous decisions on 3 pages alone.[54] But this "self-adoration" does not change the general conclusion that international tribunals, including the ICJ, use subsidiary sources extensively.

51 Borda A.Z., *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EJIL 649, 654 (2013).

52 *Ibid.*, pp. 652–3.

53 Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, p. 854; Wyrozumska A., *Prawotwórcza działalność sądów międzynarodowych i jej granica* [in:] *Granice swobody orzekania sądów międzynarodowych*, ed. Wyrozumska A., Uniwersytet Łódzki 2014, p. 15, available at: http://wpia2.uni.lodz.pl/zeupi/Publikacje/Anna_Wyrozumska_red_Granice_swobody_orzekania_sadow_miedzynarodowych.pdf (5.01.2015).

54 Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, p. 855.

As mentioned at the beginning, the Court has never explicitly indicated that it is referring to judicial decisions – either its own, of other international tribunals, or of municipal courts – as subsidiary sources, probably to avoid the troublesome matter of interpreting Article 38 of its Statue. This approach is in direct contradiction with how the ICJ refers to domestic rulings to establish the existence of a customary rule, when it plainly states that it is examining the State practice and *opinio juris* in the form of judicial decisions as it did, e.g. in the *Jurisdictional Immunities case* discussed previously. Therefore, the reliance on these decisions as subsidiary sources of international law may only be inferred from the treatment by the Court of the national rulings in its judgments. The above-presented few instances of that practice provide clear examples of references to municipal judicial decisions as subsidiary sources. They are not discussed in isolation, but rather in conjunction with arbitral tribunal cases and even the doctrine of international law. Even more, municipal rulings are in such cases treated separately from State practice and, therefore, may not be confused with a process of determining a customary rule.

Confronted with the problem of double nationality in the *Nottebohm case*,[55] the International Court of Justice firstly examined the jurisprudence of arbitral tribunals and subsequently municipal courts' decisions. The ICJ observed:

> [s]imilarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.[56]

Unfortunately, it is impossible to examine in greater detail the Court's assessment of domestic judiciary practice in this case as no particular national judicial decision or even a national court was indicated in the judgment. Nevertheless, the ICJ seemed to differentiate in its judgment between the State practice and judicial decisions along with the scholarship, which speaks for treating the latter as subsidiary sources of international law.[57] The Court declared the real and effective nationality rule controlling and concluded in its judgment that nationality granted by Lichtenstein to Mr Nottebohm through naturalisation in the circumstances of the particular case could not constitute an adequate title to justify a recourse to the diplomatic protection exercised against Guatemala.

55 *Nottebohm case (Second Phase)* (Liechtenstein v. Guatemala), Judgment, 1955 ICJ Rep. 4 [*Nottebohm case*].

56 *Ibid.*, p. 22.

57 *Ibid.*, p. 23: "According to the practice of States, to arbitral and judicial decisions [emphasis added] and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".

Furthermore, while adjudicating the territorial dispute between Botswana and Namibia in the *Kasikili Island case*,[58] the World Court was first and foremost called to determine the location of the main channel of the Chobe River. It is traditionally considered as the line of an interstate boundary. Such determination in the opinion of the ICJ shall be based on certain criteria, including the depth and width of a river. While trying to reconstruct the mechanism of measuring the latter parameter under international law, the Court found that "the width has often been determined on the basis of the low water mark"[59] by referring to the bilateral treaty from the nineteenth century and the *Vermont v. New Hampshire* judgment of the US Supreme Court of 19 May 1933. It later indicated that the other possibility was the mean water level, as determined and applied in the 1933 arbitral case. This former approach prevailed in the case at hand.[60]

In the more recent *Activities Carried Out by Nicaragua case*[61] in the compensation judgment, the International Court of Justice firstly recapitulated general legal principles applicable to the compensation before moving to the specifics of the case at hand. When reconstructing a rule relating to damage valuation, it stated that "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage".[62] In support of this approach, the Court referred to its own jurisprudence (the compensation judgment in the *Diallo case*), the arbitral tribunal award, and the judgment of the US Supreme Court in *Story Parchment Company v. Paterson Parchment Paper Company*.[63] The latter was cited.

1.1.4 **Jus cogens** *before the ICJ and municipal courts*

Jus cogens norms are not a separate source of international law and shall not be treated as such. They are either customary rules or general principles, some of which have been codified in international treaties. Nevertheless, their special character under international law as non-derogable peremptory rules[64] warrants their separate consideration. A particularly important matter pertaining to *jus cogens* norms is their conflict with other rules of international law, and the case-law of the International Court of Justice – although rather scarce – could be of guidance in such instances.

So far only in one case – namely the *Jurisdictional Immunities case* – has the World Court been requested to decide upon such a conflict. The question

58 *Kasikili/Sedudu Island* (Botswana v. Namibia), Judgment, 1999 ICJ Rep. 1045 [*Kasikili Island case*].
59 *Ibid.*, ¶ 33.
60 *Ibid.*, ¶ 37.
61 *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), Compensation, Judgment, 2018 ICJ Rep. 15 [*Activities Carried Out by Nicaragua case*].
62 *Ibid.*, ¶ 35.
63 *Story Parchment Company v. Paterson Parchment Paper Company*, 282 US 555 (1931).
64 VCLT, Art. 53.

centred on whether a violation of peremptory rule may lift customary State immunities preventing a national court from proceeding with a case. Once again, the main authorities to which the Court referred to address this issue were domestic judicial decisions rendered by the House of Lords (*Jones v. Saudi Arabia*), the Canadian Court of Appeal of Ontario (*Bouzari v. Iran*), the Polish Supreme Court (*Natoniewski*), the Constitutional Court of Slovenia (case no. Up-13/99), the New Zealand High Court (*Fang v. Jiang*), and the Special Supreme Court of Greece (*Margellos*). The conclusion was that the customary rule of State immunities is not affected even by a violation of *jus cogens*.[65] Furthermore, the ICJ did not treat national rulings in this context as evidence of State practice, but rather referred to them as subsidiary sources of international law worth examining of themselves.

1.1.5 International remedies and municipal courts' decisions

According to the basic principle famously expressed by the Permanent Court of International Justice in the *Chorzów Factory case* and relating to remedies in international law for wrongful acts of States, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[66] Nevertheless, this principle is very general and vague, and it in fact grants leeway to tribunals to decide the exact form of *restitution in integrum* on a case-by-case basis. The determination of the appropriate form of remedy in international law is doubtless a question of international law. The International Court of Justice has to take into consideration several factors while deciding upon the matter of restitution, including general principles of international law, the circumstances of each case, the feasibility of available solutions, the nature and scope of an injury,[67] etc., but when it is confronted with municipal judicial decisions that have constituted a breach of international law or an act leading to such a violation, then the problem is even more complex. Such fundamental issues as judicial independence, the interplay between international and municipal law, and the supremacy of one over the other are at stake. Therefore, examination of the ICJ practice regarding remedies for a wrongful act in relation to municipal courts and their decisions shall be scrutinised in detail on the following pages.

In the *Arrest Warrant case*, the World Court explicitly pronounced that the Belgian judicial decision was unlawful and such mere finding, although constituting "a form of satisfaction which will make good the moral injury complained of by the Congo",[68] was not a sufficient restitution under international law, especially in light of the fact that the arrest warrant was still extant. Therefore, the ICJ

65 *Jurisdictional Immunities case*, ¶ 96–7.

66 *Case Concerning the Factory at Chorzów* (Germany v. Poland), Merits, Judgment No. 13, 1928 PCIJ Series A No. 17 [*Chorzów Factory case*], p. 47.

67 *Avena case*, ¶ 119.

68 *Arrest Warrant case*, ¶ 75.

decided that "Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated".[69] As a national judicial organ issued the warrant, the ICJ directly obligated the Belgian State to annul this order coming from its judicial department.

Then, Germany in the *LaGrand case* sought not only a remedy for the conviction and later execution of the LaGrand brothers carried out in violation of VCCR, but also requested the International Court of Justice to oblige the United States to provide adequate remedies within the American justice system to German nationals in case any future violation occurs.[70] The ICJ agreed with the request and found that

> should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.[71]

Although in this particular judgment the World Court did not elaborate at length on means and methods of such review and reconsideration within American criminal proceedings and did not explicitly indicate that it should be conducted through judicial proceedings, nevertheless the entire reasoning and line of argumentation pointed in this direction. This conclusion was subsequently confirmed in explicit terms in the last case of the Consular triad.[72]

Hence, in the *Avena case*, the World Court declared that adequate reparation for the violation of Article 36 VCCR was

> an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts [emphasis added] … with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.[73]

Thus, it ordered a procedural remedy rather than a substantive one, e.g. in the form of compensation, and laid down certain criteria for such a remedy to be met

69 *Ibid.*, ¶ 76 and 78(3).

70 *LaGrand* (Germany v. USA) Judgment, 2001 ICJ Rep. 466 [*LaGrand case*], ¶ 117–18.

71 *Ibid.*, ¶ 128(7).

72 The term "Consular triad" refers to three proceedings before the International Court of Justice concerning the violations of the *Vienna Convention on Consular Relations*, particularly Art. 36 relating to the consular protection, by the United States of America. These cases, chronologically, are the *Breard case*, *LaGrand case*, and *Avena case*. Each of them is discussed in detail on numerous occasions in this book.

73 *Avena case*, ¶ 121.

in the internal legal order of the United States. In particular, the relevant proceedings of review and reconsideration had to be conducted through judicial organs.

Still, Mexico sought a much more intrusive and coercive means as it requested partial or total annulment of the convictions or sentences as "the necessary and sole remedy" relying on the precedent in the *Arrest Warrant case*. The Court clearly distinguished between those two cases:

> [i]n that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (I.C.J. Reports 2002, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.[74]

This passage is of the utmost importance for understanding the assessment of municipal courts' decisions by the International Court of Justice and the practice of the latter in ordering adequate remedies for a violation of international law connected with those decisions. First and foremost, the Court confirmed that it is entitled to find that a certain domestic judicial pronouncement may be unlawful under international law and that it is warranted to order its annulment or cancellation. Secondly, the ICJ practice clearly indicates that the Court itself either may not or refrains from cancelling a domestic decision and opts for ordering a State to undertake necessary measures of its own choosing to annul decisions in question. Thirdly, such an intrusive remedy is adequate, only if a national court's decision constitutes by itself a violation of international law. In cases where a national judgment or order is only an outcome of proceedings, during which a breach occurred, the ICJ would rather oblige a State in breach to assess whether such an infringement has had an impact on the final judicial decision and what the legal consequences thereof are.

Yet another similar situation concerning municipal judicial rulings allegedly being in breach of international norms was presented to the Court in the *Jurisdictional Immunities case*. Once the ICJ found that Italian courts' decisions were issued in violation of immunities enjoyed by Germany, it accordingly decided that these decisions

> which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed,

74 *Ibid.*, ¶ 123.

in such a way that the situation which existed before the wrongful acts were committed is re-established.[75]

Meanwhile, the fact that some of these decisions had become final did not absolve Italy of this obligation.

Finally, in the *Jadhav case*,[76] similarly to the *LaGrand case* and the *Avena case* discussed above, the International Court of Justice found that the appropriate reparation for the violation of rights in relation to consular assistance should be an effective review and reconsideration of the conviction and sentence of Mr Jadhav. It did not agree with Indian requests to annul the decision of the military court as it was not the conviction and the sentence that constituted the violation of the international obligations of Pakistan *per se*.[77] Again, the judicial process was emphasised as normally "suited to the task of review and reconsideration" pointing to municipal courts and their proceedings as the optimal venues of implementation.

1.1.6 Influence of municipal courts' decisions on the jurisdiction of the ICJ and admissibility of cases

In the following paragraphs more technical or procedural issues regarding the operations of the Court in relation to decisions rendered by domestic courts are discussed. These pertain to the jurisdiction of the ICJ in contentious cases and the admissibility of parties' submissions presented to the bench in The Hague. Although in some instances the question of jurisdiction involves both matters of fact and law,[78] nevertheless the answer to the question of jurisdiction of the Court is predominantly rooted in international law – either in a treaty norm from a *compromis* or a compromissory clause in a convention[79] or in a State unilateral act in the form of an optional clause declaration issued pursuant to Article 36(2) of the ICJ Statute. Whilst addressing this particular question of international law, the practice of the International Court of Justice indicates that municipal judicial rulings may be of assistance.

In the *Interhandel case*[80] dating back to 1959, the respondent objected to the jurisdiction of the Court by claiming that the dispute arose before the date on which the acceptance of the ICJ compulsory jurisdiction came into force for the United States. Nevertheless, the World Court found that it had the *ratione temporis* jurisdiction to adjudicate the matter by indicating that a critical date, after which a claim was forwarded to the government of the United States to restitute assets of Interhandel, was a day on which the Swiss Review Authority issued a

75 *Jurisdictional Immunities case*, ¶ 137.
76 *Jadhav* (India v. Pakistan), Judgment, 2019 ICJ Rep. 418 [*Jadhav case*].
77 *Ibid*., ¶ 137–9.
78 Amerasinghe Ch.F., *Evidence in International Law*, Martinus Nijhoff Publishers 2005, p. 57.
79 ICJ Statute, Art. 36(1).
80 *Interhandel Case* (Switzerland v. USA), Preliminary Objections, Judgment, 1959 ICJ Rep. 6 [*Interhandel case*].

decision recognising the non-enemy character of those assets.[81] Nevertheless, the application of Switzerland was found inadmissible due to the lack of exhaustion of local remedies by the Interhandel company in the United States. This conclusion was based on the judgment rendered by the US Supreme Court on 16 June 1958 that reversed the decision of the Court of Appeal and remanded the case to a district court.[82] Already in 1964 Jenks indicated that international tribunals may be called upon to interpret municipal law to determine whether the exhaustion of local remedies rule is satisfied in order to exercise diplomatic protection by an applicant State or whether there still are available remedies under the local law to be taken advantage of.[83] The *Interhandel case* provides an illustration that municipal courts' decisions may aid the International Court of Justice in this issue, absolving it from delving into meanders of domestic procedural law.

In the *Aerial Incident case*[84] between Pakistan and India, the Court refused to exercise its jurisdiction as none of the jurisdictional grounds invoked by the applicant prevailed. The first one concerned Article 17 of the *General Act for Pacific Settlement of International Disputes*[85] of 1928, which the respondent opposed on the basis that it was not binding on Pakistan after gaining independence in 1947. To strengthen its argument, India referred to the judgment of the Supreme Court of Pakistan of 6 June 1961,[86] which the ICJ cited as a part of its own judgment. Nevertheless, the Pakistani ruling was not a basis of the Court's determination on jurisdictional matters as it found that the General Act was not binding in relation to India on the basis of its communication sent to the UN Secretary-General in 1974 by the Minister of External Affairs of India.[87]

Yet, a very interesting issue was brought before the Court in the *Avena case* by the United States in its objection to ICJ jurisdiction. The USA was of the opinion that Mexico was requesting the World Court to address the treatment of foreign nationals in state and federal courts as well as assessing "the operation of the United States criminal justice system as a whole".[88] Moreover, the respondent expressed the view that the Mexican submissions were, therefore, an abuse of the Court's jurisdiction.[89] The ICJ did not uphold this jurisdiction objection, declaring:

81 *Ibid.*, p. 19.
82 *Ibid.*, p. 25.
83 Jenks C.W., *The Prospects of International Adjudication*, Stevens & Sons Limited 1964, p. 568.
84 *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, Judgment, 2000 ICJ Rep. 12 [*Aerial Incident case*].
85 *General Act for the Pacific Settlement of International Disputes*, 26 September 1928, 93 LNTS 343.
86 *Aerial Incident case*, ¶ 20.
87 *Ibid.*, ¶ 27–8.
88 *Avena case*, ¶ 27.
89 *Ibid.*

> If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts.[90]

In the same case, the respondent objected to the jurisdiction on the basis that the restitution sought by Mexico would be a deep intrusion into the independence of American courts, as "[t]he Court … has no jurisdiction to review appropriateness of sentences in criminal cases, and even less to determine guilt or innocence".[91] The ICJ unfortunately did not address at length the matter of the municipal courts' independence in relation to international tribunals; nevertheless, it upheld its jurisdiction once more by indicating that if jurisdiction over a particular dispute exists, no additional jurisdictional ground is necessary in connection with remedies sought. The matter of appropriate remedies is one of merits[92] and does not fall within the scope of preliminary objections.

Although in the *Jurisdictional Immunities case*, the respondent did not raise any objections in relation to the jurisdiction of the Court, it found itself obliged to follow well-established jurisprudence that the matter should be then examined *proprio motu*. The basis of the jurisdiction in this case was Article 1 of the *European Convention for the Peaceful Settlement of Disputes*,[93] which entered into force between the parties in 1961. Under its Article 27, the Court jurisdiction *ratione temporis* was established only in relation to "facts or situations prior to the entry into force" of the Convention. The ICJ found that these facts and situations were "constituted by Italian judicial decisions that denied Germany the jurisdictional immunities which it claimed".[94] As they were rendered between 2004 and 2011, the jurisdiction was upheld.

Lastly, Pakistan in the *Jadhav case* raised an objection to the admissibility of India's application based *inter alia* on the principle of *ex turpi causa non oritur actio*. In response, the Court referred to the *Factory at Chorzów case* of PCIJ to reconstruct the content of the principle invoked in international dispute resolution. The quoted passage acknowledged that it is

> generally accepted in the jurisprudence of international arbitration as well as by municipal courts, that one Party cannot avail himself of the fact that the

90 *Ibid.*, ¶ 28.
91 *Ibid.*, ¶ 32.
92 *Ibid.*, ¶ 34.
93 *European Convention for the Peaceful Settlement of Disputes*, Strasbourg, 29 April 1957, 320 UNTS 243.
94 *Jurisdictional Immunities case*, ¶ 44.

> other had not fulfilled some obligations … if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question.[95]

Unfortunately, no direct reference to domestic judicial case-law was made. Based on those considerations and in light of the fact that Pakistan failed to explain how acts of India had prevented it from complying with consular assistance obligations, the objection was rejected.

1.1.7 Procedural issues and (dis)analogy of national process of law

Finally, a reliance by the International Court of Justice on the jurisprudence and practice of municipal courts in relation to questions of law is evident in connection with some limited procedural or evidentiary issues decided upon by the Court. The ICJ in those instances applies comparative analogy – or disanalogy – either by showing that courts of law confronted with a similar question generally address it in a certain manner or by highlighting differences between dispute settlement at the national and international levels.

A typical illustration of this analogy approach may be found in the *Nicaragua case*, where the ICJ was to resolve some evidentiary issues related to declarations of senior State officials in light of the fact that the respondent – the United States – withdrew from participation in the proceedings. The Count observed that

> [i]n the general practice of courts, two forms of testimony which are regarded as *prima facie* of superior credibility are, first the evidence of a disinterested witness – one who is not a party to the proceedings and stands to gain or lose nothing from its outcome – and secondly so much of the evidence of a party as is against its own interest.[96]

Later it concluded that

> it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve.[97]

95 *Jadhav case*, ¶ 62.

96 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Merits, Judgment, 1986 ICJ Rep. 14 [*Nicaragua case*], ¶ 69.

97 *Ibid.*, ¶ 70.

Although the ICJ referred expressly to "the general practice of courts" without mentioning any judicial decisions in this regard, it is self-evident that the described practice followed by the ICJ in the *Nicaragua case* is based on such decisions assessing presented evidence and setting legal procedural standards.

Additionally, while considering the Mexican request for the indication of provisional measures in the *Avena case*[98] to prevent the execution of its nationals pending final judgment of the Court, the ICJ was confronted with an American objection that such a request is premature. The Court answered this objection relating to the tardiness of the Mexican request in a specific manner. It recalled and cited its previous order from the *LaGrand case* and a passage from the US Supreme Court's decision in *Breard v. Greene*[99] specifying that a request shall be submitted "in good time", not at the last moment.[100]

Therefore, provisional measures were indicated, though in a modified form from the requested.

An example of disanalogy with municipal procedural practice identified by the Court may be found in the *Nauru case*.[101] Australian submitted that in order to proceed on merits the World Court should have first received consent from the United Kingdom and New Zealand. These three countries used to form the administrating authority of Nauru and, consequently, were responsible for the trusteeship agreement, violations of which were alleged by Nauru. The Court explained that

> [n]ational courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered; that solution makes it possible to settle a dispute in the presence of all the parties concerned. But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention.[102]

Consequently, the ICJ did not agree with the Australian argument and found that the lack of consent from a third State did not preclude it from adjudicating upon a submitted claim, "provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for".[103]

98 *Avena and Other Mexican Nationals* (Mexico v. USA), Provisional Measures, Order of 5 February 2003, 2003 ICJ Rep. 77 [*Provisional Measures in Avena case*].

99 *Breard v. Greene*, 523 US 371 (1998).

100 *Provisional Measures in Avena case*, ¶ 54.

101 *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Preliminary Objections, Judgment, 1992 ICJ Rep. 240 [*Nauru case*].

102 *Ibid.*, ¶ 53.

103 *Ibid.*, ¶ 54.

1.2 Questions of fact and municipal judicial decisions

Municipal courts' decisions assist the International Court of Justice, as indicated in the previous chapter, in its determinations of international law contents and application. But within the jurisprudence of the ICJ their role and function are much broader, particularly in recent times, as domestic judicial rulings are also treated as facts. As such, they are subject to evidence provided by parties to a dispute brought to the bench of the ICJ. The doctrine and arbitral tribunals recognised this evidentiary effect of domestic judgments long before the ICJ was created.[104] Nevertheless, the last decades have brought some new tendencies in this regard, which warrant detailed discussion on the following pages.

1.2.1 Municipal courts' decisions and the subject-matter of a dispute before the ICJ

Although the function and role of the International Court of Justice within the international community have not undergone a major change from the time of its creation, the subject-matter of cases both in contentious and advisory proceedings has shifted significantly in recent times. Such typical issues of traditional international law as territorial disputes, use of force instances, and international organisation-related matters are no longer the only subject of the Court's judicial interest, although they still make up a substantial portion of its docket. Surprisingly, the World Court is called more often to scrutinise judicial proceedings of States and their outcomes in the form of courts' rulings, particularly in criminal matters, as issues pertaining to immunities and criminal cooperation as well as the rights of defendants have been brought within the purview of its jurisdiction. This could be attributed to recent developments in international law in those fields and the intensification of international cooperation in criminal matters. Additionally, national courts are nowadays much more frequently asked to adjudicate in a variety of international law matters than in the decades of the Cold War. In some instances, those judicial determinations initiate inter-State disputes that cannot be confined or settled through traditional diplomatic channels and, therefore, States refer those internationalised controversies having commenced at national benches to the International Court of Justice.

As judicial activities of States are brought before the Court to be examined, it is not surprising that particularly domestic courts' decisions are called upon to be scrutinised as well. The Permanent Court of International Justice highlighted in the *Certain German Interests case* that

> [f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute

104 Ralston J.H., *The Law and Procedure of International Tribunals*, Stanford University Press 1926, p. 384.

> the activities of States, in the same manner as do legal decisions or administrative measures.[105]

It is clear that that judicial decisions in the light of international law may be qualified as State conduct and as such may allegedly violate international law. Therefore, they may constitute the subject-matter of a dispute to be decided upon by the ICJ or at least form a major element of such a dispute within a longer chain of State acts brought to the bench of the World Court. The empirical data presented at the beginning of this chapter indicate that this possibility is not a mere theoretical divagation but a new trend in the jurisprudence of the International Court of Justice as evidenced by the case-law presented.

In 1957, the Netherlands initiated proceedings before the Court against Sweden claiming that several judicial decisions issued by Swedish courts in relation to the guardianship of Marie Boll were in violation of the 1902 *Convention Governing the Guardianship of Infants*.[106] The ICJ focused its analysis particularly on the judgment of the Swedish Supreme Administrative Court of 21 February of 1956 that upheld the measure of protective upbringing in relation to the infant in question.[107] The legal question to be answered by the Court during the proceedings was whether the protective upbringing regime infringed the full exercise of guardian rights and, therefore, violated the 1902 Convention. The ICJ found that the 1902 Convention did not govern the protection of children matters and, thus, the Swedish court's decision was outside its scope of application and could not have violated it. Consequently, the claim of the Netherlands was rejected.[108]

An extremely complex example of the intertwining of municipal courts' decisions and international tribunals' proceedings is the *Barcelona Traction case*,[109] in which the applicant generally sought reparation for the denial of justice allegedly committed by Spanish courts and other authorities in relation to a company owned by foreign investors. In summary, before the filing of the application instituting the proceedings of the International Court of Justice, 2,736 orders were issued and 494 judgments were rendered by lower and 37 by higher Spanish courts, including the court of Reus, the Barcelona Court of Appeal, and the Supreme Court of Spain.[110] Nonetheless, the Court did not examine the case on merits due to the lack of *jus standi* of Belgium.[111]

105 *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1926 PCIJ Series A No. 7, p. 19 [*Certain German Interests case*].

106 *Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden), Judgment, 1958 ICJ Rep. 55, p. 10 [*Guardianship of Infants case*].

107 *Ibid.*, p. 15: "There is a subject for dispute only as a result of the judgment of February 21st, 1956, which decided that the measure should be maintained".

108 *Ibid.*, pp. 19 and 21.

109 *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), 1970 ICJ Rep. 3 [*Barcelona Traction case*].

110 *Ibid.*, ¶ 13, 17, 18, 25.

111 *Ibid.*, ¶ 102.

Subsequently, the UN Economic and Social Council requested the International Court of Justice firstly to issue an advisory opinion which was to examine the status of Mr Dato' Param Cumaraswamy as a Special Rapporteur of the UN Commission on Human Rights on the independence of judges and lawyers, including applicable immunities from legal process, together with the obligation of Malaysia in relation to his person.[112] In *Immunity of a Special Rapporteur Opinion*[113] the ICJ had examined a decision of the Malaysian High Court of Kuala Lumpur dated 28 June 1997, and the Court of Appeal dismissal of 8 July the same year as well as the Federal Court of Malaysia ruling of 19 February 1998 that refused to honour the immunity of Mr Cumaraswamy. Remarkably, the International Court of Justice refrained from pronouncing that these particular municipal decisions in themselves constituted violations of Article VI, Section 22 of the *Convention on the Privileges and Immunities of the United Nations*,[114] but rather preferred to pin the blame on the Government of Malaysia for not informing Malaysian courts about the findings of the UN Secretary General.[115] It also focused only on secondary issues in relation to the judicial organs of Malaysia, mainly procedural and fiscal.[116] Such an approach may signify the sense of comity and deference showed by the International Court of Justice to national judicial organs. Nevertheless, in this advisory proceeding, the World Court made for the first time certain determinations relating directly to the conduct of the courts of a State. On a different note, as observed by Gattini, "it is not perchance that this bolder stance has appeared for the first time in an Advisory Opinion"[117] issued on the request of the United Nations organ.

Unlike in the first two contentious cases described at the beginning, in two cases of the Consular triad, the Court reached the merit phase of the proceedings and was asked to evaluate whether certain practices of law enforcement and judicial organs of the United States of American were to be considered violations of Article 36 of VCCR. In both the *LaGrand case* and the *Avena case*, the International Court of Justice had no doubt that treaty provisions were breached. In the first case, the ICJ scrutinised judgments and orders of the Superior Court of Pima County in Arizona finding the LaGrand brothers guilty of first degree murder, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping, imposing the death penalty on the convicts and later

112 UN ECOSOC, *Resolution 1998/297. Request for an Advisory Opinion of the International Court of Justice*, 5 August 1998, UN Doc. E/1998/98, p. 117.

113 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 ICJ Rep. 62 [*Immunity of a Special Rapporteur Opinion*].

114 *Convention on the Privileges and Immunities of the United Nations*, New York, 13 February 1946, 1 UNTS 15.

115 *Immunity of a Special Rapporteur Opinion*, ¶ 67.

116 *Ibid.*, ¶ 61, 64–4, and 67.

117 Gattini A., *Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes* [in:] *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, ed. Fastenrath U., et al., Oxford University Press 2011, p. 1175.

rejecting petitions based on lack of consular notification; of the Supreme Court of Arizona rejecting an appeal, later rejecting post-conviction relief and further setting the date of execution; of the US District Court for the District of Arizona rejecting writs of *habeas corpus*, which was reaffirmed on appeal by the US Court of Appeals, Ninth Circuit; and finally of the US Supreme Court.[118] The Court clearly indicated that at least some of those judicial decisions were to be considered as acts by the United States undertaken in contradiction to obligations deriving from Article 36(2) VCCR. It found that "by not permitting the review and reconsideration … of the convictions and sentences of the LaGrand brothers after the violation referred to in paragraph (3) above had been established"[119] (a lack of consular notification without delay) the USA breached the Convention. As a rule, such post-conviction relief falls within the domain of the judicial branch of government, including in the United States. Furthermore, the World Court was requested to adjudicate whether the United States violated its international obligations stemming from the ICJ provisional measures order of 3 March 1999 that obliged the USA to take all necessary measures to ensure that Walter LaGrand was not executed pending the judgment on merits.[120] The Court reviewed measures taken by the respondent, including the US Supreme Court decision in *Federal Republic of Germany v. United States*[121] that rejected the German application for a stay of execution without granting a preliminary stay as proposed by one of the US Supreme Court judges.[122] The United States did not discharge obligations imposed in the above-mentioned order according to the ICJ.[123]

The *Avena case* was much more complex, at least from a factual perspective, since the International Court of Justice was requested by Mexico to find the United States in breach of VCCR in relation to trials, convictions, and sentences imposed on 52 Mexican nationals within criminal proceedings undertaken by state courts in California, Texas, Illinois, Arizona, Arkansas, Nevada, Ohio, Oklahoma, and Oregon[124] as well as at the federal level in district and appellate courts and additionally before the US Supreme Court.

Yet another example of a municipal court's decision being a precise and sole subject-matter of a dispute brought before the International Court of Justice is provided in the *Arrest Warrant case*. On 11 April 2000, an investigating judge of the Brussels *Tribunal de première instance* rendered an international arrest warrant *in absentia* against Mr Abdulaye Yerodia Ndombasi – the Minister for Foreign Affairs of the Congo at that time, for war crimes and crimes against humanity.[125]

118 *LaGrand*, ¶ 14, 19, 20, 23, 25, 28, 29, 34.
119 *Ibid.*, ¶ 128(4).
120 *LaGrand* (Germany v. USA), Provisional Measures, Order of 3 March 1999, 1999 ICJ Rep. 9, ¶ 29(I)(a) [*Provisional Measures in LaGrand case*].
121 *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999).
122 *LaGrand*, ¶ 114.
123 *Ibid.*, ¶ 115 and 128 (5).
124 *Avena case*, ¶ 15.
125 *Arrest Warrant case*, ¶ 13–15.

In its application, the DRC requested the ICJ to order Belgium to annul the warrant as infringing the immunities of senior governmental officials. In its final judgment, the Court agreed with the applicant and found that the decision of Belgian investigating judge contravened international law.[126]

Furthermore, in its application in the *Certain Property case*,[127] Liechtenstein brought to the Court's attention the so-called *Pieter van Laer Painting case* that was decided by German courts upon a lawsuit of Prince Hans-Adam II of Liechtenstein in his personal capacity. It was dismissed by all domestic courts involved, including the Cologne Regional Court (10 October 1995), the Cologne Court of Appeal (9 July 1996), the Federal Court of Justice (25 September 1997), and the Federal Constitutional Court (28 January 1998), on the basis that "under Article 3, Chapter Six of the Settlement Convention, no claim or action in connection with measures taken against German external assets in the aftermath of the Second World War were admissible in German courts".[128] Therefore, those domestic judicial decisions were the subject-matter of a dispute. Moreover, the Court concluded, based on other German judgments – no. II ZR 64/58 and II ZR 86/54 before the Federal Court of Justice – that German conduct in regard to lack of jurisdiction to address the legality of any confiscation of property as regulated in the Settlement Convention[129] has been consistent for years. Nevertheless, the ICJ did not adjudicate on merits as it found no jurisdiction to review municipal courts' decisions from the standpoint of international law in this particular case.

Another instance in which the International Court of Justice was called upon to adjudicate a dispute relating to courts' decisions in criminal matters was the *Criminal Mutual Assistance case*[130] between Djibouti and France. Djibouti claimed that several decisions rendered in France in relation to Judge Bernard Borrel's death and upon requests for mutual assistance were contrary to France's treaty obligations and infringed on immunities recognised by international law. The first municipal decision to be assessed by the Court was an order from 2005 of Judge Clément, an investigating judge from the Paris *Tribunal de grande instance*, refusing a Djibouti request for mutual assistance in the form of transmission of record copies from French proceedings on the basis of Article 2(c) of the Mutual Assistance Convention as prejudicing *ordre public* of France. The ICJ found that such a refusal was based on legal grounds permitted by this treaty.[131] Secondly, the same French judge issued a witness summons to the President of Djibouti on 17 May 2005, while he was visiting France in his official capacity.

126 *Ibid.*, ¶ 78(2).

127 *Certain Property* (Liechtenstein v. Germany), Preliminary Objections, Judgment, 2005 ICJ Rep. 6 [*Certain Property case*].

128 *Ibid.*, ¶ 16.

129 *Convention on the Settlement of Matters Arising out of the War and the Occupation*, Bonn, 26 May 1952, 332 UNTS 219.

130 *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, 2008 ICJ Rep. 177 [*Criminal Mutual Assistance case*].

131 *Ibid.*, ¶ 148 in connection with ¶ 28.

The summons was then transmitted directly to the Embassy of Djibouti in Paris without observing rules of diplomatic communication set out in French criminal procedural law. The second summons followed on 14 February 2007 through an intermediary of the French Ministry for Foreign Affairs as prescribed by law. None was accompanied by any coercive measures, and President Ismaël Omar Guelleh did not appear to testify. The World Court found that the first decisions while not associated with any measures of constraint did not constitute any breach of immunities vested in heads of states. Nevertheless, "Judge Clément failed to act in accordance with the courtesies due to a foreign Head of State".[132] The latter judicial decision, while communicated through diplomatic channels, was in agreement with international law. The last decisions of the French judiciary to fall into the Court's purview were European arrest warrants issued on 27 September 2006 by the *Chambre de I'instruction* of the Versailles Court of Appeal against Mr Hassan Said Khaireh – the Djiboutian Head of National Security, and Mr Djama Souleiman Ali – Djiboutian *procureur de la Républic*. The Court, however, found itself without jurisdiction to review those municipal decisions in the light of international law.[133]

Then, one of the submissions of Mexico in the *Avena Interpretation Request case*[134] was to declare that the execution of José Ernesto Medellin Rojas was contrary to obligations imposed on the United States by the ICJ order indicating provisional measures issued during the pendency of the main proceedings. Medellin filed an application for a writ of *habeas corpus* and for stay of execution in federal courts, but they were rejected and, consequently, his sentence was carried out. The decisions of American courts had, thus, a direct relation to the dispute. The World Court found the United States in violation of the order. Yet another submission related to review and reconsideration as an obligation of result, expressed in paragraph 153(9) of the *Avena case*. The applicant invoked that in *Medellin v. Texas*[135] the US Supreme Court stressed that any future actions in relation to the judgment of the ICJ in the *Avena case* should have been undertaken through the political branch of the United States government. Mexico contended, "this understanding by the Supreme Court is inconsistent with the interpretation of the *Avena* Judgment as imposing an obligation of result incumbent on all constituent organs of the United States, including judiciary".[136] The World Court indicated, however, that this legal issue concentrated on the direct effect or enforceability of its judgments in domestic legal regimes, a matter not decided upon in the original judgment. Hence, an interpretation requested by Mexico under Article 60 of the ICJ

132 *Ibid.*, ¶ 171 and 172.

133 *Ibid.*, ¶ 35, 182, and 200.

134 *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, 2009 ICJ Rep. 3 [*Avena Interpretation Request case*].

135 *Medellin v. Texas*, 552 U.S. 491 (2008).

136 *Avena Interpretation Request case*, ¶ 31.

Statute[137] might not have been rendered. Interestingly, in the *Avena Interpretation Request case* the International Court of Justice came probably closest to addressing directly the fundamental yet quite controversial matter of the enforceability of its decisions in domestic regimes. Nevertheless, it preferred to invoke the lack of jurisdiction to avoid the matter.

Another case recently adjudicated by the Court, in which the subject-matter was directly associated with municipal courts' decisions, is the *Jurisdictional Immunities case*. The ICJ was requested to examine violations of international law obligations of Italy committed through its judicial practice as exemplified by decisions of the Italian Court of Cassation, the Court of Appeal of Florence, the Military Court of Appeals in Rome, the Court of Arezzo, the Court of Turin, the Court of Sciacca, and the Military Court of La Spezia in the *Ferrini*, *Mantelli et al.*, *Maietta*, *Milde*, and *Distomo* cases.[138] All those decisions were rendered, as Germany claimed, in breach of State immunities, to which the applicant was entitled under customary international law. German rights were infringed in particular when Italy allowed civil claims to be brought against Germany in Italian courts, when measures of constraint were taken in relation to German property in Italy, and when Greek judgments rendered against Germany were found enforceable in Italy by domestic courts. The World Court expressly resolved in the judgment that certain municipal courts' decisions violated international customary law.[139]

The *Iranian Assets case*,[140] a case not yet decided on merits, has concentrated on judicial and enforcement proceedings brough by private plaintiffs in the United States courts against Iran for damages arising from acts allegedly supported by it, including the bombing of the US army barracks in Beirut. The most famous of those cases is the *Peterson case*.[141] Iran claims that underlying judicial decisions were issued in breached of international law pertaining to State immunities enjoyed not only by the State but also by State-owned enterprises. Those matters would be addressed by the Court in its final judgment.

Although the main issue in the *Chagos Archipelago Opinion* concerned the legality of the separation of the Chagos Archipelago from Mauritius by the United Kingdom before the former gained independence, the questions put forward by the UN General Assembly referred also to the "resettlement on the Chagos

137 ICJ Statute, Art. 60: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party".

138 *Jurisdictional Immunities case*, ¶ 27–9.

139 *Ibid.*, ¶ 107: "The Court therefore holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owned by the Italian State to Germany"; and ¶ 133: "The Court accordingly concludes that the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the judicial immunity of Germany".

140 *Certain Iranian Assets* (Iran v. United States of America), Preliminary Objections, Judgment, 2019 ICJ Rep. 7.

141 *Bank Marakazi v. Peterson*, 136 S. Ct. 1310 (2016).

Archipelago of its nationals".[142] Thus, the International Court of Justice, while discussing the factual context of the case, addressed as well the situation of the Chagossians, their forced displacement from the islands, and their attempts to return to their land. Those included several judicial proceedings before British courts, particularly challenging the legislation banning any residence on the Archipelago. Despite some judgments rendered in their favour, the Court concluded that "the Chagossians remain dispersed in several countries … By virtue of United Kingdom law and judicial decisions of that country, they are not allowed to return to the Chagos Archipelago".[143]

In its next judgment in the *Jadhav case* the World Court was requested to address similar issues as in the Consular triad, as the dispute between India and Pakistan concerned the question of consular assistance regarding the arrest, detention, trial, and sentencing of Mr Jadhav. His trial was heard by a Field General Court Martial of Pakistan in 2016 and 2017. As a result, he was convicted for espionage, sabotage, and terrorism and sentenced to death. His appeal was rejected by the Military Appellate Court.[144] Pakistan did not allow India to provide consular access, despite numerous requests in this regard, even when proceedings were initiated at the bench of the International Court of Justice. Furthermore, the *Jadhav case* provides a good example of an interweaving of municipal and international judicial proceedings concerning the same factual situation. The trial of Jadhav commenced on 21 September 2016, and his sentence was handed down in April 2017 in the first instance. On 8 May 2017, India lodged an application with the Registry of the Court together with a request to indicate provisional measures. Those were ordered ten days later. Yet, on 22 June 2017, Pakistan announced that an appeal of Jadhav was rejected.

Finally, in the most recent *Immunities and Criminal Proceedings case*,[145] the dispute between Equatorial Guinea and France arose from criminal proceedings instituted against Mr Teodoro Nguema Obiang Mangue – a Vice-President of Equatorial Guinea and a son of the President – and French courts' decisions rendered during those proceedings. Those were *i.a.*: an order on the attachment of the building (*saisie pénale immobilière*) by the investigating judge of the Paris *Tribunal de grande instance*, a decision of the *Chambre de l'instruction* of the Paris *Cour d'appeal* upholding the attachment of the property, a judgment of the *Tribunal correctionnel* finding Mr Nguéma Obiang guilty of money laundering, and a judgment of the Paris *Court d'appel* upholding the conviction. In its final judgment, the World Court found that the building at 42 Avenue Foch in Paris had

142 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 ICJ Rep. 95 [*Chagos Archipelago Opinion*], ¶ 132.

143 *Ibid.*, ¶ 131. Judicial decisions that the ICJ discussed in its Opinion were rendered by the Divisional Court, the High Court, the Court of Appeal, the House of Lords, and the Supreme Court of the United Kingdom.

144 *Jadhav case*, ¶ 25–32.

145 *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Judgment, 2020 ICJ Rep. [*Immunities and Criminal Proceedings case*].

never acquired the status of premises of a diplomatic mission and, consequently, the acts complained of by the applicant, including French judicial rulings relating to this property, could not constitute a breach of international obligations deriving from VCCR.[146] Interestingly, the *Immunities and Criminal Proceedings case* is another instance of domestic and international judicial proceedings intertwining. The application of Equatorial Guinea was lodged with the Registry of the ICJ on 13 June 2016, only a few days after the investigation against Mr Obiang Mangue was completed in France. The order for indication of provisional measures was issued by the Court in December 2016, while the judgment in the first instance was rendered on 27 October 2017 by the Paris *Tribunal correctionnel*. The decision on appeal was handed down in February 2020, while the judgment of the International Court of Justice on merits was delivered on 11 December 2020. Within the French jurisdiction, the case against Obiang Mangue was still ongoing at that time as he lodged a cassation.

In addition, domestic judicial decisions may also be and are invoked before the International Court of Justice by parties in their requests for the indication of provisional measures as a justification for preserving their respective rights[147] during the pendency of a dispute. On a few occasions the ICJ has agreed with moving parties in their assessment that in particular circumstances of each case national courts' decisions may cause a risk of "irreparable prejudice".[148] Such situations primarily occur when the proceedings of national criminal justice systems are brought to the attention of the ICJ.

Such a request was filed in the *Breard case*,[149] the first of the Consular triad initiated against the United States of America. As Paraguay had exhausted all possible legal and diplomatic channels,[150] it instituted international proceedings by filing an application in the Registry of the Court on 3 April 1998 together with an urgent request for the indication of provisional measures in light of the fact that the Circuit Court of Arlington County, Virginia, ordered the execution of Breard to take place on 14 April 1998. This particular order of the Virginian court was considered by the ICJ as adequate justification for indicating provisional measures "whereas such an execution would render it impossible for the Court to order

146 *Ibid*., ¶ 31, 36, 38, and 121.

147 ICJ Statute, Art. 41.

148 The International Court of Justice has developed in its jurisprudence the legal test specifying when requested measures may be ordered. Especially, circumstances of a case are such as to create "irreparable prejudice … to rights which are the subject of dispute" (*Nuclear Tests* (New Zealand v. France), Interim Protection, Order of 22 June 1973, 1973 ICJ Rep. 135, ¶ 21; *United States Diplomatic and Consular Staff in Teheran* (US v. Iran), Provisional Measures, Order of 15 December 1979, 1979 ICJ Rep. 7, ¶ 36) and the state of urgency is evident (*Passage through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, 1991 ICJ Rep. 17, ¶ 23; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, 2007 ICJ Rep 11, ¶ 32).

149 *Vienna Convention on Consular Relations* (Paraguay v. USA), Provisional Measures, Order of 9 April 1998, 1998 ICJ Rep. 248 [*Breard case*].

150 *Ibid.*, ¶ 3.

the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims".[151] Therefore, the United States was obligated to take "all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings",[152] an obligation it did not comply with.[153]

In the *Arrest Warrant case*, the Democratic Republic of Congo requested the World Court to immediately annul the disputed arrest warrant issued by a Belgian investigating judge of Brussels *tribunal de première instance* against the DRC Minister for Foreign Affairs – Mr Abdulaye Yerodia Ndombasi.[154] The DRC argued that that judicial decision effectively barred the Minister from travelling abroad and, thus, discharging his duties as a senior official responsible for foreign affairs.[155] Nevertheless, due to changes in the DRC administration before the order on provisional measures was rendered, Mr Yerodia ceased to hold his office as the Minister for Foreign Affairs and was assigned responsibility for the education portfolio. Consequently, the main justification for indicating those measures was no longer existent. In light of such circumstances, the ICJ did not agree with the DRC and concluded,

> it has not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor … the degree of urgency is such that those rights need to be protected by the indication of provisional measures.[156]

In the *Criminal Proceedings in France case*[157] the Republic of Congo also unsuccessfully requested the Court to indicate a provisional measure by declaring that France

> shall cause to be annulled the measures of investigation and prosecution taken by the *Procureur de la République* of the Paris *Tribunal de grande instance*, the *Procureur de la République* of the Meaux *Tribunal de grande instance* and the investigating judges of those courts.[158]

Those measures included *inter alia* a *mandate d'amener* (a warrant for immediate appearance) issued by the French investigating judge on 16 September

151 *Ibid.*, ¶ 37.
152 *Ibid.*, ¶ 41.
153 *See*: Stout D., *Clemency Denied, Paraguayan Is Executed*, 15 April 1998, New York Times, http://www.nytimes.com/1998/04/15/us/clemency-denied-paraguayan-is-executed.html (6.08.2014).
154 *Arrest of Warrant of 11 April 2000* (DRC v. Belgium), Provisional Measure, Order of 8 December 2000, 2000 ICJ Rep. 182.
155 *Ibid.*, ¶ 7–11 and 70.
156 *Ibid.*, ¶ 72 and 78.
157 *Certain Criminal Proceedings in France* (Congo v. France), Provisional Measure, Order of 17 June 2003, 2003 ICJ Rep. 102.
158 *Ibid.*, ¶ 2.

2002 against General Norbert Dabira – the Inspector-General of the Congolese Armed Forces having a residence in the area of the Meaux court jurisdiction. Nonetheless, the ICJ declined to issue an order indicating a provisional measure, simply because "Congo has not demonstrated the likelihood or even the possibility of any irreparable prejudice to the rights it claims resulting from the procedural measures taken in relation to General Dabira".[159] Therefore, in the opinion of the Court, the practical results of a warrant issued by French judicial authorities only hindered General Dabira's ability to travel to France without fear of being taken into custody and, thus, did not meet a legal threshold for indicating provisional measures.

The *Avena case* was further recalled when, on the basis of Article 60 of the ICJ Statute,[160] Mexico lodged with the Court its request for interpretation of the Avena judgment in relation to the American reparation in the form of the review and reconsideration of convictions and sentences imposed on Mexican nationals with the violation of rights deriving from VCCR. Mexico also moved to request a provisional measure obligating the United States to adopt all measures necessary to ensure that none of the five Mexicans named in the request was executed before the International Court of Justice adjudicated on the merits. The applicant position was that paragraph 153(9)[161] of the judgment rendered in the *Avena case* created an obligation of result that required the United States to review and reconsider American courts' judgments concerning Mexican nationals named in it and their execution may not proceed without such review and reconsideration. Decisions rendered by American courts after the delivery of the Avena judgment – including the US Supreme Court, the Supreme Court of California, federal courts of appeals, and Texan state courts – did not comply with this obligation[162] by either dismissing directly or indirectly on procedural grounds any post-conviction relief or by not staying executions for other organs of the United States to take legislative or executive actions. Considering those circumstances, the ICJ concluded that named Mexican nationals were at risk of their death sentences being carried out in the coming months and that "their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which is in question". As a consequence, it ordered provisional measures accordingly.[163]

159 *Ibid.*, ¶ 38.

160 "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party".

161 *Avena*, ¶ 153(9): "*Finds* that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the: convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment".

162 *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (Mexico v. USA), Provisional Measures, Order of 16 July 2008, 2008 ICJ Rep. 311, ¶ 4–6.

163 *Ibid.*, ¶ 73 and 80.

Additionally, when confronted with the request for indication of provisional measures originating from Equatorial Guinea in the *Immunities and Criminal Proceedings case*,[164] the World Court agreed that premises at 42 Avenue Foch in Paris should be inviolable and treated as housing a diplomatic mission pending a final decision. While considering legal criteria for indicating provisional measures, especially the existence of a risk of irreparable prejudice and urgency, the ICJ observed that "[g]iven that it is possible … that, during the hearing on the merits, the *Tribunal correctionnel* may … request further investigation or an expert opinion, it is not inconceivable that the building on Avenue Foch will be searched again". Furthermore, the Court found that due to the attachment (*saisie pénale immobilière*) of that real estate ordered by a French investigative judge a risk of its confiscation might occur before a final decision was rendered. Thus, the ICJ was satisfied that there existed "a real risk of irreparable prejudice to the right to inviolability of the premisses".[165]

Then, once again when considering a risk of irreparable prejudice and urgency in the *Ukraine v. Russia case*,[166] the International Court of Justice was concerned with the decision of the Supreme Court of the occupied Crimea to ban the *Mejlis* – the highest representative body of Crimean Tatars – subsequently confirmed by the Supreme Court of the Russian Federation. Finding that the risk indeed existed, it ordered the Russian Federation to comply with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and to "refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*".[167]

Finally, the *Jadhav case*[168] pertaining to the detention and trial of an Indian national, Mr Kulbhushan Sudhir Jadhav, followed a similar line of argument as other cases brought before the Court relating to consular protection under the Vienna Convention on Consular Relations. As Jadhav was sentenced to death by a Pakistani military court, the ICJ was of the opinion that "as far as the risk of irreparable prejudice to the rights claimed by India is concerned, the mere fact that Mr. Jadhav is under such a sentence and might therefore be executed is sufficient to demonstrate the existence of such a risk".[169] As the situation of a possible appeal was very uncertain and Pakistan did not give any assurances in relation to

164 *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, 2016 ICJ Rep. 1148.

165 *Ibid.*, ¶ 90.

166 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, 2017 ICJ Rep. 104.

167 *Ibid.*, ¶ 106 (1)(a).

168 *Jadhav* (India v. Pakistan), Provisional Measures, Order of 18 May 2017, 2017 ICJ Rep. 231.

169 *Ibid.*, ¶ 53.

a stay of execution, the Court was also satisfied that urgency had been present. Consequently, provisional measures were indicated.

Municipal courts' decisions are not only factual grounds for issuing provisional measures orders, but they may also provide reasons of a refusal by the Court of their ordering. This was the case in the *Interhandel case*[170] when, before the conclusion of incidental proceedings relating to provisional measures, the US Supreme Court rendered an order granting *certiorari* to Interhandel to review the decision of the Court of Appeals concerning the qualification of its assets as enemy property, including shares in American corporations. In its request to indicate provisional measures, Switzerland asked the International Court of Justice to order *inter alia* a prohibition on the sale of these shares until the final judgment was rendered. The ICJ concluded that

> it appears that, according to the law of the United States, the sale of those shares can only be effected after termination of a judicial proceeding which is at present pending in that country in respect of which there is no indication as to its speedy conclusion, and … such a sale is therefore conditional upon a judicial decision rejecting the claims of Interhandel.

As a result, it found that "there is no need to indicate interim measures of protection".[171]

1.2.2 Municipal courts' decisions as effectivités

A review of the jurisprudence of the International Court of Justice in territorial disputes reveals an interesting pattern of attaching considerable importance to national courts' decisions in such cases. Those rulings, in the Court's opinion, exemplify the exercise of State authority or sovereignty over a disputed territory. Therefore, they are considered *effectivités*[172] that are relevant in situations when the acquisition of a territory by means of prescription or occupation is considered. This doctrine is an application of the far-reaching international law principle of effectiveness that requires a claiming State to provide evidence of an effective exercise of its territorial sovereignty over a disputed territory in order to substantiate its claims.[173] As territorial and maritime disputes form a significant portion of

170 *Interhandel case* (Switzerland v. USA), Provisional Measures, Order of 24 October 1957, 1957 ICJ Rep. 105.

171 *Ibid.*, p. 11.

172 Grant J.P., Barker J.C., *Encyclopaedic Dictionary of International Law*, ed., Oxford University Press 2009, p. 177: "factual elements that demonstrate the exercise of governmental authority in a territory".

173 In Jenks' words: "Municipal legislation and the exercise of jurisdiction by municipal courts and other authorities are manifestations of sovereignty which may be elements in the proof of title to territory", Jenks C.W., *The Prospects of International Adjudication*, Stevens & Sons Limited 1964, p. 576.

the ICJ docket, it is not a surprise that the Court has already addressed the issue of municipal courts' jurisdiction in relation to territorial claims.

The first judgment illustrating this phenomenon is the *Minquiers and Ecrehos case*.[174] During the proceedings, France and the United Kingdom asserted sovereignty over groups of tiny islets in the English Channel in close proximity to the coast of Normandy. In support of its claim, the UK produced evidence of the *Quo Warranto* proceeding which took place back in 1309 in relation to the Ecrehos. The International Court of Justice observed that

> when the Prior of the Ecrehos appeared as the Abbot's attorney in answer to the summons, jurisdiction in respect of the Ecrehos was exercised by the Justices, who decided that "it is permitted to the said Prior to hold the *premissa* as he holds them as long as it shall please the lord the King".[175]

Moreover, it was proven that the Royal Court of Jersey exercised criminal jurisdiction over the islands from at least the end of the nineteenth century. Similarly, seventeenth-century rolls of the Manorial Court of Noirmont from Jersey revealed cases concerning shipwrecks found at the Minquiers and evidenced court orders issued in this regard. Likewise, in relation to the Minquiers, some judgments of the Royal Court of Jersey concerning salvage cases of objects found in the islands were produced and dated back to the seventeenth and nineteenth centuries.[176] Confronted with clear manifestations of *effectivités* exercised by the United Kingdom through its courts, the Court found that "sovereignty over the islets and rocks of the Ecrehos and Minquiers groups … belongs to the United Kingdom".[177]

In the famous *Qatar v. Bahrain case*[178] Bahrain claimed sovereignty over the Hawar Islands *inter alia* on the basis of *effectivités* "exercised continuously and uninterruptedly over the last two centuries"[179] by its courts. The respondent provided judicial decisions relating to land rights and fishing traps on the contested territory from the beginning of the twentieth century, information on court disputes between islands residents, and orders of Bahrain courts relating to arrests and compelled attendances of disputed territory inhabitants.[180] Notwithstanding, the World Court finally awarded the islands to Bahrain due to the British *quasi*-arbitral decision of 1939 which made it "unnecessary for the Court to rule on the

174 *The Minquiers and Ecrehos case* (France v. UK), Judgment, 1953 ICJ Rep. 47 [*Minquiers and Ecrehos case*].
175 *Ibid.*, p. 63.
176 *Ibid.*, pp. 65, 67–9
177 *Ibid.*, p. 72.
178 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment, 2001 ICJ Rep. 40 [*Qatar v. Bahrain case*].
179 *Ibid.*, ¶ 101.
180 *Ibid.*, ¶ 101–2.

arguments of the Parties based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris* to the present case".[181]

Similarly, *effectivités* were also not decisive in the *Cameron v. Nigeria case*[182] in relation to Nigerian sovereignty over areas in the Lake Chad region, but due to different reasons. Nigeria provided a decision of the Wulgo Area Court of 1981 with litigants being residents of Darak, a village in disputed territory, and the Court agreed that the proven practice constituted *effectivités*[183] as "[s]ome of these activities – the organization of public health and education facilities, policing, the administration of justice – could normally be considered to be acts *à titre de souverain*".[184] Nevertheless, the ICJ concluded that a pre-existing title was held by the applicant and, consequently, the "sovereignty has continued to lie with Cameroon".[185]

Finally, in 2007, the ICJ rendered a judgment in the *Caribbean Sea case*[186] concerning a maritime boundary and territorial dispute in relation to Bobel Cay, South Cay, Savanna Cay, and Port Royal Cay. The World Court dismissed Nicaraguan claims to the islands and confirmed the sovereignty of Honduras in this regard[187] mostly on the basis of post-colonial *effectivités* of the respondent. Honduras produced during the proceedings evidence as to the exercise of criminal and civil jurisdiction over the islands in dispute, including labour cases from the Labour Court of Puerto Lempira and the Court of Roatan as well as decisions of the Lower Court of Puero Lempira.[188] The Court found that

> the evidence provided by Honduras of the application and enforcement of its criminal and civil laws does have legal significance in the present case. The fact that a number of these acts occurred in the 1990s is no obstacle to their relevance as the Court has found the critical date in relation to the islands to be 2001. The criminal complaints had relevance because the criminal acts occurred on the islands in dispute in this case (South Cay and Savanna Cay).[189]

Furthermore, it pronounced that "the *effectivités* invoked by Honduras evidenced an 'intention and will to act as sovereign' and constitute a modest but real display of authority over the four islands"[190] and that

181 *Ibid.*, ¶ 148.
182 *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, 2002 ICJ Rep. 303 [*Boundary between Cameroon and Nigeria case*].
183 *Ibid.*, ¶ 70.
184 *Ibid.*, ¶ 67.
185 *Ibid.*, ¶ 70.
186 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment, 2007 ICJ Rep. 659 [*Caribbean Sea case*].
187 *Ibid.*, ¶ 321(1).
188 *Ibid.*, ¶ 182–3.
189 *Ibid.*, ¶ 185.
190 *Ibid.*, ¶ 208.

> Honduras has shown a sufficient overall pattern of conduct to demonstrate its intention to act as sovereign in respect of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. The Court further notes that those Honduran activities qualifying as *effectivités* which can be assumed to have come to the knowledge of Nicaragua did not elicit any protest on the part of the latter.[191]

1.2.3 Fact-finding function of municipal courts and factual determinations of the ICJ

The fact-finding function is another important task of any court of law, including international tribunals. No legal rule in judicial proceedings is applied in a vacuum without reference to the factual circumstances of a case, either contentious or advisory. But the capacity to establish facts differs significantly between municipal courts and international tribunals. The former in disputes finally reaching an international plane are generally better equipped to examine and assess the facts of such disputes. They have direct access to witnesses and may compel their appearance to testify. Domestic courts may obligate private persons and public authorities to produce relevant documents and evidence at their disposal. They are in a better position to call and assess expert witnesses, carry out inspections, or gather similar evidence. They are also familiar with local customs and practices that often have a bearing on disputes. Those considerations are certainly known to judges of the International Court of Justice, the international tribunal that does not possess similar or equivalent tools at its disposal in relation to fact-finding. Therefore, it is not surprising that the Court in certain circumstances opts to rely on factual determinations reached by national judicial organs in cases originally considered by those domestic courts.[192]

The International Court of Justice in the *ELSI case*[193] found that "the municipal courts had been fully seized of the matter which is the substance of the Applicant's claim before the Chamber"[194] relating to damages suffered by American corporations and a causal link between the conduct of Italian authorities – primarily the Mayor of Palermo ordering the requisition of a production plant – and

191 *Ibid.*

192 Quite a relevant quotation of the Franco-German Section of the Commissions under the Versailles Treaty in regard to the fact-finding function of municipal courts and its importance before international tribunals was included in Ralston J.H., *The Law and Procedure of International Tribunals*, Stanford University Press 1926, ¶ 384: "A mixed commission does not consider itself bound by a national judgment and is free to examine anew the facts of the case; but it can in judging upon documents rest upon the facts shown by such a national judgment and make them its own, when such judgment is sufficiently clear and conclusive, and its reasoning shown the litigated facts and the pleas of the defendant and possesses in the country where it was rendered the authority of *res judicata*". In this vein: Shany Y., *Jurisdictional Competition between National and International Courts: Could International Jurisdiction-Regulating Rules Apply?*, 37 Netherlands YIL 3, 46 (December 2006).

193 *Elettronica Sicula S.P.A. (ELSI)* (USA v. Italy), Judgment, 1989 ICJ Rep. 15 [*ELSI case*].

194 *Ibid.*, ¶ 58.

the bankruptcy of an Italian company owned by those American corporations. Consequently, the Court relied on Italian courts' factual findings pertaining to this particular order and its effect on the ELSI bankruptcy to substantiate its own reasoning. Firstly, while examining an alleged violation of a right to control and manage a company under Article III of the American-Italian Treaty of Friendship, Commerce and Navigation of 1948, the ICJ asserted that in cases of public emergencies or similar events every legal system provides for some kind of limitation of normal exercise of rights and "in this respect considerable interest must attach to the reasons given by the Prefect in his decision, and to the legal analysis of that decision by the Court of Appeal of Palermo"[195] (*Corte di Appello di Palermo*). Citing the determination of the latter court in its judgment of 24 January 1974 that the plant requisition was "a typical case of excess of power, which is of course a defect of lawfulness of an administrative act",[196] it concluded that it appeared *prima facie* a violation of Article III.

This *prima facie* determination needed to be supported by a causal link of the violation and damages suffered by an Italian company being a subsidiary of American corporations. Again, the ICJ shared the factual findings of Italian courts. The Court of Palermo adjudicating damage claims concluded that no such a link between company bankruptcy and the requisition existed as the economic situation of ELSI had been problematic for years.[197] On appeal, the Court of Appeal of Palermo shared this view. After discussing facts established by municipal courts, the Court highlighted:

> [t]he Chamber has no need to go into the question of the extent to which it could or should question the validity of a finding of Italian law, the law governing the matter, by the appropriate Italian courts. It is sufficient to note that the conclusion above, that the feasibility of an orderly liquidation plan is not sufficiently established, is reinforced by reference to the decision of the courts of Palermo on the claim by the trustee in bankruptcy for damages for the injury caused by the requisition. Whether regarded as findings of Italian law or as findings of fact, the decisions of the courts of Palermo simply constitute additional evidence of the situation which the Chamber has to assess.[198]

Consequently, the World Court considered American claims in this regard as "purely a matter of speculation". Furthermore, the Court depended on the Court of Appeal of Palermo's conclusion that ELSI's workers unlawfully occupied the production plant, but no damage resulting from such an occupation could be

195 *Ibid.*, ¶ 74.
196 *Ibid.*, ¶ 75.
197 *Ibid.*, ¶ 97.
198 *Ibid.*, ¶ 99.

established.[199] This led the ICJ to find that the mere fact of the occupation did not constitute the breach of the standard of protection and security under the Treaty of Friendship, Commerce and Navigation of 1948.

The final claim of the United States in the *ELSI case* concerned the violation of Article I of the Supplementary Agreement to the aforementioned Treaty by Italy that prohibited any arbitrary or discriminatory measures against nationals or corporations of the other party. The applicant claimed that the reacquisition order was exactly a measure of such a nature. The World Court did not share this view by discussing Italian national judicial procedures in relation to the order of the Mayor of Palermo. Although the Court of Appeal of Palermo found the order unlawful, in the opinion of the ICJ, nothing in this municipal ruling could have indicated that the international threshold for arbitrariness was met.[200] But stating so, the Court explained a more general issue of a relation between the fact-finding function of national courts and the determination of violation of international law by international tribunals:

> A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[201]

Later in the *Avena case*, the World Court was requested by Mexico *inter alia* to establish whether the provision of information on consular rights to Mr Juárez some 40 hours after his arrest occurred "without delay" as required by Article 36 (1)(b) VCCR. In the circumstances of the case when his foreign nationality was apparent to arresting authorities from the beginning, the aforementioned rule was breached. To support its own conclusion the ICJ indicated that "the same finding was reached by a California Superior Court".[202]

Then, in the *Diallo case*, parties were in dispute over whether, after the expulsion of Mr Diallo from the DRC, a new *gérant* of Africontainers-Zaire was appointed. Guinea produced as the evidence the decision of the *Court d'Appel* of Kinshasa/Gombe dated 20 June 2002, which directly referred to Mr Diallo

199 *Ibid.*, ¶ 107.
200 *Ibid.*, ¶ 127–8.
201 *Ibid.*, ¶ 124.
202 *Avena case*, ¶ 59 and 89.

as the *gérant associé* of the company, and, thus, in the opinion of the applicant no change took place in this regard. The Court shared the view of Guinea and observed that the DRC did not meet the burden of proof in establishing that a new management of the company in question was instituted.[203]

The Dakar Court of Appeal concluded in its decision, subsequently upheld by the Senegalese Court of Cassation, that

> the Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention.

This conclusion was likewise adopted in the *Aut dedere aut judicare case* by the International Court of Justice, which determined that "by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution" and, therefore, breached its obligations under the Torture Convention.[204]

Remarkably, in the *Jurisdictional Immunities case*, the World Court chose to refer to military courts' decisions in *Von Mackensen and Maelzer*[205] and *Kesselring*[206] to support its own findings that the conduct of Germany during World War II of the same kind as acts underlining claims brought to Italian courts was a grave breach of the international law of armed conflicts as applicable in the 1940s of the last century, especially in relation to murdering civilian hostages in Italy.[207] This determination of legal qualification of the German conduct is surprising mostly because it was not within the scope of the dispute; nevertheless the Court clarified the issue by reference to municipal decisions.[208]

In the *Chagos Archipelago Opinion* the ICJ referred to determinations made by the UK High Court of Justice relating to payments for the renunciation of claims of the Chagos population,[209] when it stated that 1,344 islanders were paid in total £4 million for renouncing their rights to return to the Archipelago in writing and only 12 persons refused to sign a required document.

203 *Ahmadou Sadio Diallo* (Guinea v. DRC), Merits, Judgment, 2010 ICJ Rep. 639 [*Diallo case*], ¶ 111–12.

204 *Aut dedere aut judicare case*, ¶ 76.

205 *Trial of General Von Mackensen and General Maelzer*, British Military Court, Case No. 43, VIII *Law Reports of Trials of War Criminals* 1.

206 *Trial of Kesselring*, British Military Court, Case No. 44, VIII *Law Reports of Trials of War Criminals* 9.

207 *Jurisdictional Immunities case*, ¶ 52.

208 *Ibid.*, ¶ 53, after divagating for a page or so about the matter, the Court concluded: "However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested".

209 *Chagos Archipelago Opinion*, ¶ 120.

1.2.4 Questions of municipal law before the ICJ

The International Court of Justice is required from time to time to take into account or even apply and interpret municipal laws to settle disputes brought to the bench. The status of questions of domestic law is, however, different than that of international law. In this regard the approach of the World Court and its predecessor has been constant and consistent – municipal law is a fact that requires evidence in the international proceedings as any other facts on which parties rely.[210] The jurisprudence of the Permanent Court of International Justice provides some general directives emphasising the importance of municipal judicial decisions while addressing issues of national laws.[211] They have been recapitulated by the ICJ in the *Diallo case*:

> [t]he Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts … Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.[212]

Thus, the International Court of Justice recognises the special role and function of municipal courts within international adjudication in relation to national laws they are established to administer. Furthermore, this reliance on national judicial decisions while clarifying, applying, and interpreting municipal laws is rather an established principle shared not only by the Court itself but also by arbitral tribunals.[213]

Nevertheless, the theoretical stance of the Court just presented does not reflect the entire complexity of the problem of the question of municipal law before an

210 *Certain German Interests case*, p. 19.

211 *Case Concerning the Payment in Gold of Brazilian Loans Contracted in France* (France v. Brazil), Judgment, 1929 PCIJ Series A, No. 21, p. 124–5 [*Brazilian Loans case*]: "Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries … Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country … It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based".

212 *Diallo case*, ¶ 70. *See* also *ELSI case*, ¶ 62.

213 Jenks C.W., *The Prospects of International Adjudication*, Stevens & Sons Limited 1964, p. 593 mentions the *Kronprins Gustaf Adolf case* (Sweden v. USA), 18 July 1932, 2 UNRIAA 1239.

international tribunal established to adjudicate a dispute on the basis of international law. As Jenks rightly indicated,

> [a] municipal law or a municipal judgment is clearly a fact … but … it does not follow from this that they are solely facts which have no normative quality in relation to rights, obligations and transactions upon which the Court is called to adjudicate.[214]

Thus, domestic law, and consequently its application through judicial organs, can have "a decisive influence on the Court's decisions",[215] although it is not codified as a formal source of law under Article 38 of the ICJ Statute.

The jurisprudence of the International Court of Justice and its predecessor the Permanent Court of International Justice provides several examples of reliance on municipal law and domestic judicial decisions and their "normative quality" in settling a dispute. Strikingly, in the *Serbian Loan case*,[216] PCIJ admitted that it may settle a dispute solely on the basis of domestic law, by declaring that

> when the two States have agreed to have recourse to the Court, the latter's duty to exercise its jurisdiction cannot be affected, in the absence of a clause in the Statute on the subject, by the circumstance that the dispute relates to a question of municipal law rather than to a pure matter of fact.[217]

In this case and several others, it was the municipal law of one of the parties that was the only law of a dispute and PCIJ did not hesitated to apply it.[218]

214 *Ibid.*, p. 549.

215 Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, p. 776.

216 *Case Concerning the Payment of Various Serbian Loans Issues in France* (France v. Kingdom of the Serbs, Croats and Slovenes), 1929 PCIJ Series A, No. 20 [*Serbian Loans case*].

217 *Ibid.*, p. 19.

218 Another example in this regard may be *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 1935 PCIJ Series A/B No. 65 [*Danzig Legislative Decrees Opinion*], in which the Council of the League of Nations requested PCIJ to assess decrees adopted by competent organs of the Free City of Danzig with the Constitution of the Free City of Danzig and PCIJ provided the opinion. Nevertheless, Judge Anzilotti expressed the view that such opinion should have never been issues as "[t]he question submitted to the Court is one purely of Danzig constitutional law; international law does not come into it at all" – *Danzig Legislative Decrees Opinion* (Judge Anzilotti, indiv. op.), p. 61. A similar situation arose in *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia)* (Czechoslovakia v. Hungary), 1933 PCIJ Series A/B No. 61 [*Peter Pázmány University case*], where PCIJ reviewed a Hungarian law to establish whether the university had a legal personality. Another example may be *Lighthouses Case between France and Greece* (France v. Greece), 1934 PCIJ Series A/B No. 62, in which PCIJ was confronted with a question of Ottoman contract law.

It needs to be stressed, however, that both the *Serbian Loans case* and *Brazilian Loans case*, which were disputes pertaining to municipal laws, were somewhat different than the majority of disputes referred to the ICJ. They were submitted by special agreements, in which both parties

Consequently, "while, on the surface, the [Permanent] Court [of International Justice] stopped engaging with domestic courts, paying lip-service to their case law, the PCIJ was inclined to freely interpret domestic law and actually operate as a municipal court itself".[219]

The International Court of Justice has showed more caution when confronted with questions of municipal law. It seems to adhere to Judge Anzilotti's stricter approach:

> [o]f course the Court may have – and has often had – to decide as to the meaning and scope of a municipal law … It has however done so only if and in so far as this is necessary for the settlement of international disputes, or in order to answer questions of international law. The interpretation of a municipal law as such and apart from any question or dispute of an international character is no part of the Court's functions.[220]

Furthermore, its practice indicates that the Court does in fact answer questions of municipal law with the assistance of domestic courts as an incidental issue while adjudicating international disputes.

For example, when confronted with the issue of whether a company requisitioned by Italian authorities suffered a damage leading to its insolvency or whether the condition of this enterprise was so bad economically before the requisition that no damage really occurred, the World Court in the *ELSI case* had to interpret domestic law.

> On this matter of insolvency in Italian law, consideration must also be given … to the findings of the Court of Palermo and the Court of Appeal of Palermo on the action brought by ELSI's trustee in bankruptcy, for damages.[221]

As Italian courts voiced the opinion that the financial position of ELSI had been deteriorating for some time or even that the state of insolvency had been reached before the requisition, no causal link between the insolvency and the requisition was established and therefore no compensation was due.

In addition, while assessing the Norwegian practice of delimiting territorial waters in the light of rules and principles of international law, the Court in the *Fisheries case*[222] was called upon to interpret the Royal Decree of 22 February

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agreed to request the Court to settle controversies arising in the domestic sphere, more: Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, ¶ 128 and Jenks C.W., *The Prospects of International Adjudication*, Stevens & Sons Limited 1964, p. 571.

219 d'Aspremont J., *The Permanent Court of International Justice and Domestic Courts: A Variation in Roles* [in:] *Legacies of the Permanent Court of International Justice*, eds. Tams Ch.J., Fitzmaurice M., Martinus Nijhoff Publishers 2013, p. 223.

220 *Danzig Legislative Decrees Opinion* (Judge Anzilotti, indiv. op.), pp. 61–2.

221 *ELSI case*, ¶ 96.

222 *Fisheries case* (UK v. Norway), Judgment, 1951 ICJ Rep. 116.

1812 setting the basic rules of this process in Norway. The text did not clearly indicate the method of drawing the baselines between islands or islets, but the decree's application revealed that that they should have been in the form of straight lines. The "final authority" in this regard was the judgment of the Norwegian Supreme Court in the *St. Just case* of 1934.[223]

Then, the International Court of Justice in the *Pedra Branca case*[224] considered the scope of application and effect of the 1843 Foreign Jurisdictional Act adopted by the British Imperial Parliament. The Court decided to refer to British municipal courts' decisions interpreting and applying this statute as "the authorities" in the ICJ words. Based on *Sobhuza II v. Miller*[225] and *Secretary of State for India v. Sardar Rustam Khan*[226] rendered by the British Privy Council and *Nyali v. Attorney-General*[227]by the English Court of Appeal, it concluded that "there is strong support for the proposition that the Act did not extend the jurisdiction of the Crown at all; it provided only for the manner of exercising it".[228]

Yet another instance of domestic courts' role in addressing issues of municipal law, this time relating to the scope and limits of competencies of State organs, may be identified in the *Criminal Mutual Assistance case*. The International Court of Justice relied on the judgment of 19 October 2006 of the *Chambre de l'instruction* of the Paris Court of Appeal resolving that the authority to execute letters rogatory lies exclusively within the competence of an investigating judge under French law. Thus, it concluded that a letter from the Principal Private Secretary to the French Minister of Justice could not have been construed as containing a legal undertaking by France in regard to Djibouti letter rogatory.[229] Moreover, it is an investigating judge who is competent to decide upon matters relating to security and *ordre public*, not the Minister of Justice, under Article 2 of the *Convention on Mutual Assistance in Criminal Matters between France and Djibouti*,[230] according to the French judiciary. "It is not for this Court to do other than accept the findings of the Paris Court of Appeal on this point".[231]

Finally, in the recent *Jadhav case* during the discussion of adequate remedies under international law for the violation of international obligations deriving from VCCR, the Court was confronted with a Pakistani assertion that review jurisdiction is exercised by the High Courts of Pakistan and, thus, no additional remedy was necessary. To address this issue of municipal law, the ICJ referred to the

223 *Ibid.*, pp. 22–3.

224 *Sovereignty over Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), Judgment, 2008 ICJ Rep. 12, ¶176 [*Pedra Blanca case*].

225 [1926] AC 518.

226 [1941] AC 356.

227 [1957] AC 253.

228 *Pedra Blanca case*, ¶ 176.

229 *Criminal Mutual Assistance case*, ¶ 128–30.

230 *Convention on Mutual Assistance in Criminal Matters between France and Djibouti*, 27 September 1986, 1695 UNTS 298.

231 *Criminal Mutual Assistance case*, ¶ 146.

decision of the Supreme Court of Pakistan in *Said Zaman Khan et al. v. Federation of Pakistan*[232] interpreting the Constitution of the respondent that in fact limited the availability of judicial review of people being tried under any laws of the Pakistani armed forces. Having considered those limitations as articulated by the Supreme Court of Pakistan and related constitutional provisions, the International Court of Justice concluded that "it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention".[233]

1.3 ICJ's position vis-à-vis municipal courts and their role in the jurisprudence of the World Court

The International Court of Justice refers to national judicial rulings for assistance in answering questions of international law. Even more often, the ICJ has scrutinised these decisions as facts to determine whether international law was breached or international standards respected. But the jurisprudence of the Court also provides for general and theoretical understanding of the role and status of the World Court vis-à-vis domestic courts and its stance on the inter-judicial relations between those judicial institutions. Furthermore, it presents some reflections as well on the status and the part national judicial organs play or may play in connection with disputes settled or legal questions addressed by the ICJ.

1.3.1 ICJ's competence to assess municipal judicial decisions

The most significant issue naturally relates to whether the Court is entitled to review, examine, and decide upon national judicial decisions within the framework of its proceedings. One of the functions of any international tribunal is to determine that municipal law and judicial decisions based upon such law are consistent with the international legal obligations of the State concerned. The empirical data presented at the beginning of this chapter prove that this trend is growing, at least as far as the ICJ is concerned. According to Judge Lauterpacht, it would be "both novel and, if accepted, subversive of international law"[234] to exclude from the purview of international law and any international tribunal as its organ an issue regulated by municipal legislation and domestic case-law only due to the national character of the issue. Already in 1926, the Permanent Court of International Justice affirmatively answered the question of its competence vis-à-vis decisions of municipal courts. In the *Certain German Interests case*, it was asked to adjudicate and declare that Polish laws having amounted to the

232 *Jadhav case*, ¶ 141.

233 *Ibid.*

234 *Case of Certain Norwegian Loans* (France v. Norway), Judgment, 1957 ICJ Rep. 9 (Judge Lauterpacht, diss. op.), p. 37.

liquidation of the German property were not in conformity with Polish treaty obligations. As a preliminary remark, PCIJ concluded that:

> The Court is certainly not called upon to interpret the Polish law as such; there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[235]

Although this attitude of PCIJ has been shared and adopted by the ICJ, the cited passage from the *Certain German Interests case* also presents some limitations on the competence of the Court to assess national judicial decisions. The ICJ is not called upon to determine that national laws have been applied correctly and accurately from the standpoint of the national legal regime, but rather that such an application and underlying judicial decisions are rendered in accordance with international standards deriving either from treaty obligations or from customary rules. This restraint is further developed and clarified in the noteworthy passage from Judge Guggenheim's separate opinion in the *Nottebohm case* that "an international tribunal is competent to decide upon the validity of a rule or an act under municipal law if such rule or act is relevant to the international dispute under examination".[236]

As far as the practice of the World Court is concerned, its first decision providing some guideline in regard to the assessment of municipal judicial decisions is the *Immunity of a Special Rapporteur Opinion*.[237] In this decision, the ICJ scrutinised the proceedings of Malaysian courts and determined that the High Court of Kuala Lumpur did not decide on the immunity of Mr Cumaraswamy *in limine litis*, but proceeded to hear the case on the merits. Such a practice was found to be contrary to international law.[238]

The most straightforward answer to the question of whether the International Court of Justice is entitled to assess municipal courts' decisions was provided in the *Avena case*. The Court found that international law, including treaty obligations, may involve certain commitments of State parties in relation to their national judicial organs' conduct and standards of national courts' proceedings. In order to determine whether a breach of such an international obligation and standard took place, "the Court must be able to examine the actions of those courts in the light of international law".[239] In the meantime, the ICJ also rejected the argument of the United States that as a matter of jurisdiction an international court equipped with the power to resolve disputes related to treaty interpretation and implementation is prohibited from scrutinising municipal courts' decisions and

235 *Certain German Interests case*, p. 19.
236 *Nottebohm case* (Judge Guggenheim, sep. op.), p. 51.
237 *Immunity of a Special Rapporteur Opinion*, ¶ 17.
238 *Ibid.*, ¶ 63.
239 *Avena case*, ¶ 28.

proceedings. The reasoning in the *Avena case* highlights two main issues. Firstly, the International Court of Justice is not prevented from assessing the conduct of domestic judicial organs or their decisions and no international rule exists debarring the ICJ from enquiring into this conduct. Secondly, this power is limited to the extent an international legal rule contains certain commitments and standards in relation to courts' decisions and conducts. An international court, including the ICJ, shall refrain from assessing municipal courts *in abstracto*, in absence of an international norm obligating those courts to certain actions or omissions. This contention is reaffirmed in the Court's finding that "[h]ow far it may do so ('enquiring into the conduct of criminal proceedings') in the present case is a matter for the merits",[240] when the content and scope of application of international legal rules are considered.

This competence under international law to assess municipal courts' decisions in the light of international law implies the possibility of declaring certain domestic rulings as wrongful acts in the light of international obligations of a State. The first instance of such a verdict occurred in the *Immunity of a Special Rapporteur Opinion*. Although the World Court found that Malaysian courts breached international law by not respecting the immunity of Mr Cumaraswamy from legal process, it was very careful in declaring that it was the judicial organs responsible for this breach. The Court resolved rather that the executive should be stigmatised by not transmitting the UN Secretary General's opinion that the UN Special Rapporteur was acting in his official capacity to relevant municipal courts.[241] The International Court of Justice was not so cautious in the *Arrest Warrant case*, when it explicitly stated that the arrest warrant issued by the Belgian investigating judge was "unlawful"[242] due to the fact that it was issued against the incumbent Minister for Foreign Affairs entitled to immunities under customary international law. Similarly, in the *Jurisdictional Immunities case*, the ICJ concluded *inter alia* "the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany".[243] Interestingly, in this judgment the ICJ explicitly and directly indicated a specific judicial organ as responsible for the violation of international law attributable to Italy.

Finally, a fundamental customary principle that municipal law shall not be a justification for a violation of international law[244] is similarly applicable to municipal judicial decisions. That general rule was reaffirmed and applied by the Court in the *Aut dedere aut judicare case*, where Senegalese courts found that they lacked the jurisdiction to prosecute perpetrators on the basis of the universal

240 *Ibid.*
241 *Immunity of a Special Rapporteur Opinion*, ¶ 61, 62, 63, 67(2)(a), and 67(4).
242 *Arrest Warrant case*, ¶ 76.
243 *Jurisdictional Immunities case*, ¶ 133.
244 VCLT, Art. 27; ARSIWA, Art. 32.

jurisdiction principle as prescribed by the Torture Convention[245] due to the lack of a relevant legislative amendment.

1.3.2 The ICJ as an ultimate criminal court of appeal?

It is rather a new phenomenon that the International Court of Justice is considering, reviewing, and assessing national criminal proceedings from the standpoint of international standards.[246] In such instances respondents, whose conduct has been argued to amount to a violation of those standards in their judicial practices, raised objections that the Court shall not be competent to review those practices, as it would put the ICJ in a position of a court of criminal appeal.

This objection was firstly brought by the United States of American in the *Breard case*, when it claimed that remedy sought by Paraguay would result in the Court "acting as a universal supreme court of criminal appeals".[247] Although this issue could not have been addressed by the ICJ at length as the proceeding was discontinued by Paraguay and, thus, the case was not decided on merits, nevertheless in its order on provisional measures the Court only hinted at its view on this matter. It explained, "the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal".[248]

This issue was brought to the Court's attention again in the *LaGrand case* when the United States objected to German submissions as inadmissible before the International Court of Justice. They would, in the opinion of the respondent, empower the ICJ to "play the role of ultimate court of appeal in national criminal proceedings, a role which it is not empowered to perform". According to the American line of argument, the Court was asked to "address and correct … asserted violations of US law and errors of judgment by US judges in criminal proceedings in national courts".[249] The ICJ did not share this opinion and found the case admissible. It rejected the notion that it may act in any capacity as a court of appeal in criminal matters by referring to it functions under Article 38 of the ICJ Statute.

> Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to

245 *Aut dedere aut judicare case*, ¶ 113.

246 For a broader perspective on the International Court of Justice and domestic criminal justice, *see*: Keith K.J., *The International Court of Justice and Criminal Justice*, 59 ICLQ 895 (October 2010).

247 *Vienna Convention on Consular Relations* (Paraguay v. USA), Provisional Measures, Order of 9 April 1998, 1998 ICJ Rep. 248, ¶ 30.

248 *Ibid.*, ¶ 38.

249 *LaGrand*, ¶ 50.

> require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case.[250]

In this respect, a relevant passage from the *ELSI case* illustrating the difference between the international and national judicial review could be instructive:

> Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[251]

What is more, in the *LaGrand case* the subject-matter of the proceedings did not concentrate on the accuracy and correctness of convictions of the LaGrand brothers and relevant sentences imposed on them, but rather it focused on the internationally recognised rights of Germany and its nationals and their alleged violation by the US organs, including courts.

The International Court of Justice has constantly and persistently maintained the approach once expressed in the *LaGrand case*. In the last case of the Consular triad – the *Avena case* – the United States, faced with a failure of this argument in two previous cases, modified it slightly and extended its scope both on jurisdiction and admissibility. Firstly, the USA argued that allowing the Court to assess the federal and state criminal justice systems of the United States would lead to the abuse of jurisdiction of the World Court. Secondly, in relation to remedies sought by Mexico (the annulment by the USA of the convictions and sentences imposed on Mexican nationals), the respondent maintained that they would have intruded "deeply into the independence of its courts". Moreover "[t]he Court has no jurisdiction to review appropriateness of sentences in criminal cases, and even less to determine guilt or innocence, matters which only a court of criminal appeal could go into". The ICJ rejected all objections to the jurisdiction and admissibility of the last dispute of the Consular triad. The International Court of Justice stressed that its competence to apply international law allows the Court to inquire into the conduct of municipal courts together with their decisions. Furthermore, it observed that the question of remedies is rather a matter to be determined on merits and no additional jurisdictional basis in required to proceed.[252]

Although PCIJ was keener to "play the part of a national court of appeals applying municipal law as such",[253] the International Court of Justice has rejected

250 *Ibid.*, ¶ 52.

251 *ELSI case*, ¶ 73.

252 *Avena case*, ¶ 27, 28, 32, 34, and 37.

253 Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, ¶ 128. Moreover, PCIJ was in fact called to act as a typical court of appeal in the *Peter Pázmány University case* considering an appeal from the judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal.

such a possibility and never delved further than required into determinations and pronouncements of municipal courts to settle an international dispute. Even in the *LaGrand case*, in which the procedural institution of the American law – the procedural default rule – hindered the possibility of raising the VCCR violation argument in federal courts, the Court found it could not have declared that this rule as such was contrary to international law and specified that only its particular application to the specific case brought by Germany was contrary to treaty obligations of the United States.[254] This method is based on the well-established rule of international law that international tribunals may not directly declare invalidity of national laws or judicial decisions, as they must respect the reserved domain of domestic jurisdiction.[255]

The arguments of the International Court of Justice confronted with the objection of the appellate-like review of national proceedings seem to follow the fourth instance formula developed within international human rights jurisprudence, particularly in the field of fair trial rights.[256] This principle is deeply rooted in the conviction that international supervisory mechanisms shall not be employed to review municipal court decisions as a next instance or a court of higher jurisdiction. The international proceedings may only focus on examination of the national judicial process in the limited scope of its compatibility with international rules, not its observance of its internal legal system. The most basic distinction in this regard concentrates on the different review standards of municipal courts' decisions. In the national proceedings, these are national norms, before international tribunals only international points of reference. Again, this approach is based upon the subsidiary principle of international supervisory mechanisms. It was explained by the Inter-American Commission on Human Rights that:

> The nature of that role [the subsidiary role of international human rights supervisory institutions] also constitutes the basis for the so-called "fourth instance formula" applied by the Commission, consistent with the practice of the European human rights system. The basic premise of this formula is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.
>
> The Commission is competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other

254 *LaGrand case*, ¶ 90–1.

255 Brownlie I., *Principles of Public International Law*, 6th ed., Oxford University Press 2003, p. 39.

256 For more detailed discussion of the formula, *see*: Pinto M., *National and International Courts – Deference or Disdain?*, 30 Loyola of Los Angeles ICLR 247 (2008) and Dahlberg M., *'It is not Its Task to Act as a Court of Fourth Instance'. The Case of the ECtHR*, 7 European J. of Legal Studies 84 (Winter 2014).

> right guaranteed by the Convention. However, if it contains nothing but the allegation that the decision was wrong or unjust in itself, the petition must be dismissed under this formula. The Commission's task is to ensure the observance of the obligations undertaken by the States parties to the Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. Such examination would be in order only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention.[257]

Consequently, as the character of the review undertaken by an international institution is not appellate in nature and a different set of legal standards are applicable, an international court is competent neither to reverse, set aside, annul a domestic judicial decision nor to declare the invalidity of national statutory norms. It has jurisdiction to declare the violation of international standards and, when applicable, rule upon appropriate remedies.

Such an approach and the fourth instance formula so far have been adopted in the jurisprudence of human rights tribunals and quasi-judicial international bodies. The International Court of Justice in the presented Consular triad seems to extend its applicability to a wider range of instances, particularly when the rule of the exhaustion of local remedies is at issue. Nevertheless, the possibility of reviewing and assessing domestic proceedings, even in criminal cases, from the standpoint of international standards freely adhered to by a State is not a novelty in international law. Human rights courts quite often engage in such judicial activity, particularly in fair trial and due process cases. Similarly, due to the principle of complementarity, the International Criminal Court is obligated to assess the unwillingness or inability of a national system of justice genuinely to carry out the investigation or prosecution of perpetrators at the admissibility stage of each case.[258]

In fact, the *LaGrand case* is not the first one in which domestic judicial proceedings were scrutinised by the World Court. Other instances include the *Guardianship of Infants case* and the *Barcelona Traction case*, not to mention the case-law of the Permanent Court of International Justice. This phenomenon is attributed to the fact that municipal courts are leading adjudicators of international law vested with the international judicial function. International tribunals are only envisaged as supervisory mechanisms.[259] In order to exercise this function, the International Court of Justice is inherently and legally entitled to examine national judicial decisions from the standpoint of international law.

257 *Santiago Marzioni v. Argentina*, Report No. 39/96, Case 11.673, Inter-Ameri.C.H.R., 15 October 1996, ¶ 50–1 (emphasis added).

258 *Rome Statute of the International Court of Justice*, 17 July 1998, Rome, 2187 UNTS 90, Art. 17 [*Rome Statute*].

259 Tzanakopoulos A., *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 Loyola of Los Angeles ICLR 133, 163–4 (2011–12).

1.3.3 Assessing the validity and scope of municipal courts' decisions

In the already discussed *Minquiers and Ecrehos case*, France relied on the judgment of the Court of France issued on 28 April 1202, probably the oldest determination of a municipal judicial organ to be reviewed by the ICJ. The judgment condemned King John of England to forfeit all the lands which he held in fee of the King of France. The International Court of Justice was confronted with the issue of whether the judgment was applicable to the Channel Islands and, consequently, to Minquiers and Ecrehos islands. Therefore, it needed to pronounce upon the validity and scope of the mediaeval Court of France decision. The World Court determined that it was not applicable to the Channel Islands, because French kings were not in the possession of them and, hence, could not have granted them in fee to dukes of Normandy. "To revive its legal force to-day by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal considerations".[260] Nevertheless, the Court did not expatriate upon bases that allowed it to assess the validity and application of municipal courts' decisions. It seems rather from the circumstances of the case that it was an exceptional instance.

This example, rather isolated, of the World Court's assessment of the scope and validity of a national judicial decision affirms the aforementioned conclusions that the ICJ is competent to examine municipal rulings from the international law perspective and pronounce on their legal effects on the international plane in relation to an international dispute brought to its bench for adjudication.

1.3.4 Distinguishing between the case at hand and the case before a municipal court

The case-law of the International Court of Justice illustrates yet another practice of dialoguing with municipal courts. The Court seems to feel compelled in certain instances to relate to famous and significant domestic judgments with an international bearing but decides not to follow their jurisprudential lead. It discusses a national judicial decision but points to differences either in the factual background or in legal matters that were at stake. Such a situation occurs predominantly when agents or counsels of parties appearing either in contentious or advisory proceedings refer to municipal case-law to support their legal arguments.

In advisory proceedings concerning the *Kosovo Independence Opinion*[261] many participants referred to the Supreme Court of Canada opinion regarding the secession of Quebec.[262] Nevertheless, the Court observed that "the question in the present case is markedly different from that posed to the Supreme Court

260 *Minquiers and Ecrehos case*, pp. 13–14.

261 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, 2010 ICJ Rep. 403 [*Kosovo Independence Opinion*].

262 *Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, Supreme Court, Canada, 20 September 1998, [1998] 2 SCR 217.

of Canada"[263] and explained why the Canadian decision shall be distinguished from a legal matter referred to by the UN General Assembly. The former dealt exclusively with a positive entitlement of internal State entities to unilateral secession, the later only with the existence of international rules that would prohibit such succession. "[I]t is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it".[264]

In the *Jurisdictional Immunities case*, the World Court found the *Pinochet* judgment[265] from the House of Lords non-instructive to answer the question of customary international law on State immunities for two main reasons. Firstly, in *Pinochet* it was personal immunity in criminal proceedings at stake, not State immunity in a civil damage case. Secondly, the rationale from the British decision was strongly connected with the text of the 1984 UN Convention against Torture, without any bearing on issues and facts before the ICJ.[266] Surprisingly, the *Pinochet case* was not even introduced in the argumentation of Italy, but only relied upon by the Italian Court of Cassation in *Ferrini* that was considered by the Court. Therefore, there was no convincing reason to discuss the House of Lords ruling in the Court's judgment other than this particular inter-judicial dialog between the ICJ and Italian as well as British courts.

1.3.5 Role of municipal courts in implementing ICJ decisions

A substantial role of municipal courts in the post-adjudicative phase might be inferred from the jurisprudence of the International Court of Justice, particularly in connection with proceedings, in which the Court was requested to examine judicial organs' decisions and their conduct. Although the ICJ has never directly indicated that national courts play such an interesting and innovative role in international adjudication, examples discussed above prove that indeed they may be an important internal State actor implementing[267] the World Court's decisions and guaranteeing compliance.

In its *Immunity of a Special Rapporteur Opinion* the World Court instructed the Government of Malaysia to communicate its opinion to "the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr Cumaraswamy's immunity be respected".[268] Such wording clearly indicates that

263 *Kosovo Independence Opinion*, ¶ 55.
264 *Ibid.*, ¶ 56.
265 *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, 24 March 1999, [1999] UKHL 17.
266 *Jurisdictional Immunities case*, ¶ 87.
267 It is stressed that this subchapter discusses the role of municipal courts as an implementing catalyst of the ICJ decisions as seen and indicated in the Court's jurisprudence. The practice of national courts, being the other side of the coin, in particular in relation to the enforcement of ICJ decisions, is discussed in Chapter 2.
268 *Immunity of a Special Rapporteur Opinion*, ¶ 65.

the Court anticipated that the municipal courts of Malaysia are primary addressees of its opinion and shall be responsible for its implementation within the Malaysian system of justice, while the Executive should be rather considered as a mere channel of communication.

Moreover, in the *Avena case* the World Court described at length the role of municipal courts of the United States in implementing its judgment, in particular the ordered reparation in form of review and reconsideration of the convictions and sentences of Mexican nationals.

> The question of whether the violation of Article 36, paragraph 1, is to be regarded as having in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.[269]

The same applied to statements and confessions provided by convicted Mexican nationals prior to consular notifications. The outright exclusion of this evidence was not viable as it should be determined in the course of review and reconsideration dependant on the circumstances of each case.[270]

Interestingly, the aforementioned judgment of the International Court of Justice puts particular emphasis on the judicial process as an adequate and appropriate remedy under international law. The Court did not agree with the argument of the United States after assessing the clemency practices that these administrative procedures may be suitable for review and reconsideration. The ICJ noted that

> the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraphs 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case.[271]

Surprisingly, the ICJ scrutinised the American clemency procedures, something that was outside the scope of the dispute brought before it. Further, a standard of such scrutiny was not an international norm but rather the Court's own directive. This indicated clearly that the International Court of Justice, without further explanations, wanted the municipal courts to be its mode of implementation rather than executive organs.

269 *Avena case*, ¶ 122.
270 *Ibid.*, ¶ 127.
271 *Ibid.*, ¶ 143.

This is further emphasised by the judgment in the *Jadhav case*, in which the World Court again observed that "it is normally the judicial process which is suited to the task of review and reconsideration". The role of national courts as agents of compliance with ICJ's decisions is also strengthened by the fact that in that case the Court connected the review and reconsideration of the conviction and sentence rendered in violation of VCCR with the principle of a fair trial. "In particular, any potential prejudice and the implications of the evidence and the right of defence of the accused should receive close scrutiny".[272] Such a directive resembles rather a typical judicial review on appeal directed to a court that would reconsider a case in the light of a higher instance judgment.

Finally, the approach of the World Court towards the independence of a judgment-debtor State in implementing the Court's decisions has changed dramatically in recent times. Initially, the ICJ held the position that the issue of the modes of compliance is outside its jurisdiction and shall be decided by way of political or diplomatic processes. The best example of this attitude is the *Haya de la Torre case*,[273] in which the Court refused to assist the State parties in clarifying their obligations in relation to the execution of a former judgment entered by the ICJ in the *Asylum case*.[274] It stated:

> [h]aving thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics.[275]

Nevertheless, this stance has changed and nowadays the ICJ is willing to "pierce the veil of sovereignty" of its State litigants and order certain, specific, and concrete actions to be taken as a remedy for an international wrongful act in order to comply with its judgments.

Furthermore, such a change in the attitude toward the sovereignty and unity of a State enables the World Court to reach competent State organs in order to direct them on their role and obligations in relation to compliance with its decisions.[276] Strikingly, the addressees to which the ICJ is reaching in its pronouncements are

272 *Jadhav case*, ¶ 145.
273 *Haya de la Torre* (Colombia v. Peru), Judgment, 1951 ICJ Rep. 71 [*Haya de la Torre case*].
274 *Asylum case* (Colombia v. Peru), Judgment, 1950 ICJ Rep. 266.
275 *Haya de la Torre case*, 83.
276 Capaldo G.Z., *The Pillars of Global Law*, Ashgate 2008, p. 106.

often State judicial organs. This trend further strengthens the inter-judicial dialogue between the World Court and municipal judiciaries.

1.3.6 ICJ's directives to municipal courts

In several recent judgments, the International Court of Justice, beside exercising its traditional functions, went further and conveyed certain directives to municipal courts facing in their respective jurisdictions matters of international law. In those instances, the ICJ has acted more as a higher court of international law that provides judicial guidance and underlines certain inconsistences to lower courts – a role which in national jurisdictions is played by appeal or supreme courts. This may imply that the World Court is starting firstly to recognise that international law is a domain within which justice is administered by municipal courts and international tribunals simultaneously,[277] and secondly to hold itself as a higher court of the international regime. This is understood probably not in a hierarchical sense, but rather in relation to the application and interpretation of the substantive international rules, long-lasting legacy, and authority. Moreover, this particular practice signals that the Court is willing to go beyond what Judge Higgins called "the unitary veil of the State"[278] and speak directly to its judicial counterparts within national legal systems. This tendency may be yet another indicator of the inter-judicial dialogue between the International Court of Justice and municipal judicial organs.

As the Court found in the *Immunity of a Special Rapporteur Opinion* that the conduct of judicial organs of Malaysia was not in agreement with international law in relation to immunities from the legal process of the UN special rapporteur, it found it necessary to articulate authoritative guidelines for municipal courts in this regard, one evidentiary and another procedural in nature. The former concerned a statement of the UN Secretary-General concerning the immunity of the UN agent. In the opinion of the International Court of Justice, "[t]hat finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts".[279] This passage reveals the creation of a legal presumption in international law to be followed by domestic courts. The latter guideline instructs the judicial organs on the position of immunity issues within an overall judicial process. "By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law".[280] Not following this principle may lead

277 Lauterpacht H., *Decisions of Municipal Courts as a Source of International Law*, 10 British YIL 65, 92–3 (1929).

278 Higgins R., *Changing Position of Domestic Courts in the International Legal Order* [in:] Higgins R., *Themes & Theories*, ed. Rogers P., Oxford University Press 2009, p. 1344.

279 *Immunity of a Special Rapporteur Opinion*, ¶ 61.

280 *Ibid.*, ¶ 63.

to a violation of international law, which is what the Court declared in relation to Malaysian courts.[281]

The same directive was repeated in the *Jurisdictional Immunities case*, although in the context of State immunities rather than diplomatic immunities. The Court instructed municipal judges in a categorical tone:

> a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established.[282]

In addition, the International Court of Justice directed domestic judges in relation to requests for declaring of a foreign judgment rendered against a State enforceable in the forum jurisdiction.

> [T]he court seised of an application for *exequatur* of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction … before the courts of the State in which *exequatur* proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obligated under international law to accord immunity to the respondent State.[283]

As no such specific rule has been codified or authoritatively asserted in international law, this guideline pertaining to the enforcement of foreign judgments resembles a good practice recommended by the Court in order to adhere to the general customary international rule of State jurisdictional immunities.

Furthermore, the judgment in the *LaGrand case* had not been adequately implemented by the United States as the review and reconsideration mechanism was not made available within the American system of justice. Thus, the World Court decided in the last case of the Consular triad to recapitulate and extend certain directives aimed at guiding municipal courts in providing specific post-conviction relief in relation to foreign nationals, whose rights under VCCR have not been observed. Although in general, the USA was free to adopt specific measures facilitating recourse to the relief ordered, nevertheless in the opinion of the ICJ "this freedom in the choice of means for such review and reconsideration is not without qualification".[284] Its main goal was to assess the legal consequences of the VCCR violation upon criminal proceedings and their effects, including possible

281 *Ibid.*, ¶ 63 and 67(2)(b).
282 *Jurisdictional Immunities case*, ¶ 82.
283 *Ibid.*, ¶ 130.
284 *Avena case*, ¶ 131.

prejudice.[285] Further, the review should be effective and applicable in relation to both the conviction and sentence imposed.[286] As the violation occurred in the general framework of criminal proceedings, the relief should be available as a part of the judicial process,[287] not a clemency procedure or similar proceedings occurring within the executive branch of a government. Remarkably, it was the American courts in the first place that had not ensured the rights of foreign defendants under VCCR and, consequently, it was for them to assess whether those breaches prejudiced individuals concerned and to rectify the situation, if needed.

While considering ICJ directives to municipal courts in the *Avena* judgment relating to the judicial review and reconsideration, paragraph 151 of the ruling warrants separate discussion. Its plain text indicates that the World Court decided to widen the binding effect of its judgment despite the clear norm of Article 94(1) of the UN Charter and Article 59 of the ICJ Statute. This part of the Court's ruling seems to extend the coverage of the legal remedy ordered by the ICJ also onto nationals of other States, not only Mexico, whose rights to consular information and notification envisaged in VCCR were or are to be violated in the United States:

> [t]he Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint or the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply, that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.[288]

The analogous factual and legal background as in the Consular triad was presented also in the *Jadhav case*, in which the Court found Pakistan in violation of rights set forth in Article 36 of VCCR. The adequate remedy was again "effective

285 *Ibid.*
286 *Ibid.*, ¶ 138.
287 *Ibid.*, ¶ 140.
288 *Ibid.*, ¶ 151.

review and reconsideration of the conviction and sentence" and the ICJ recapitulated all prior directives spelled out in the *Avena case*, including the importance of the judicial process for the reparation ordered. Nevertheless, the Court went even further to emphasise the importance of the involvement of judicial organs in implementing its own judgment by associating the review and reconsideration with yet another fundamental legal principle of the criminal process. It pointed out that:

> the respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstances of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. Jadhav to be effective. The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration.[289]

It is the first time that the International Court of Justice stressed fair trial standards in its jurisprudence. Interestingly, almost as a higher court in a domestic jurisdiction, it gave guidance to Pakistani courts undertaking the judicial review to particularly consider the effects of the violation of the Vienna Convention on the evidence and the right of defence of the defendant.

1.3.7 ICJ's citation of municipal courts' decisions

The case-law of the International Court of Justice includes quotations from municipal judicial decisions, although often in the form of a sentence or a short passage. It proves that the Court engages in a sincere examination of domestic rulings and acquires knowledge of national jurisprudence. This trend also exemplifies the symptomatic change of the World Court's attitude towards municipal courts in recent decades, as in its early decisions the ICJ chose neither to cite domestic judgments nor even to specify a court or case it was referring to. A good example of this past practice is the *Nottebohm case*, in which the World Court relied on the national jurisprudence in general without citing or naming any particular jurisdiction or domestic judicial organ.[290] Recently, the ICJ has demonstrated more

289 *Jadhav case*, ¶ 145.

290 *Nottebohm case*, p. 22: "The courts of third States, when confronted by a similar situation, have dealt with it in the same way" and "Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality".

willingness to incorporate into its own decisions' citations from national courts' rulings.

Probably the oldest citation of domestic judicial organs included in the judgment of the International Court of Justice comes from the 1309 *Quo Warrante* proceedings and was included to evidence the exercise of jurisdiction over the Ecrehos islets by the King of England in the *Minquiers and Ecrehos case*.[291] In the same case, the ICJ referred similarly to the 1617 entry from the Rolls of the Manorial Court of Noirmont in Jersey.[292] The Supreme Court of Norway decision in the *St. Just case* of 1934 was quoted by the Court to provide a rationale for the Norwegian system of delimitation based on straight baselines.[293] Later, during the review of the conduct of Italian authorities in relation to a company in the *ELSI case*, the ICJ heavily relied on and quoted extensively factual determinations of Italian courts reviewing conduct of competent Italian authorities.[294] In the *Immunity of a Special Rapporteur Opinion*, the World Court cited conclusions of the Malaysian High Court of Kuala Lumpur and the Federal Court of Malaysia implying that Mr Cumaraswamy as a Special Rapporteur of the United Nations Commission on Human Rights was merely "an unpaid, part-time provider of information"[295] rather than a genuine envoy entitled to immunities in order to emphasise the breach of the Convention on the Privileges and Immunities of the United Nations on the side of Malaysia.

In the *LaGrand case*, the ICJ quoted passages from the US Supreme Court *Federal Republic of Germany v. United States*[296] together with a sentence from Justice Breyer's dissenting opinion while assessing whether measures undertaken by the United States amounted to a violation of the Court's order on provisional measures.[297] Subsequently, confronted with an American objection against the indication of provisional measures on a Mexican request as premature, the International Court of Justice in the *Avena case* cited its own previous order in the *LaGrand case* along with the US Supreme Court decision in *Breard v. Greene*.[298] In the *Wall Advisory Opinion* the Court repeated a passage from the judgment of 30 May 2004 rendered by the Supreme Court of Israel to stress that the IV Geneva Convention applies to Palestinian territories.[299]

Another example of the ICJ practice of directly referring to municipal courts' decisions may be found in the *Criminal Mutual Assistance case*, where the Court cited significant portions of French decisions that were either a subject-matter

291 *Minquiers and Ecrehos case*, p. 20: "it is permitted to the said Prior to hold the *premissa* as he holds them as long as it shall please the lord the King".
292 *Ibid.*, pp. 24–5.
293 *Fisheries case*, p. 23.
294 *ELSI case*, ¶ 75, 97, 98, 107, and 127.
295 *Immunity of a Special Rapporteur Opinion*, ¶ 8 and 13.
296 *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999).
297 *LaGrand*, ¶ 114.
298 *Provisional Measures in Avena case*, ¶ 54.
299 *Wall Advisory Opinion*, ¶ 100.

of the dispute between Djibouti and France[300] or specified competences of State organs in relation to international assistance in criminal matters within the French legal system.[301] A quotation of passages from municipal courts' decision by the Court relates also to facts established in national jurisdictions. In the *Aut dedere aut judicare case*, the ICJ relied on the conclusion reached by the Dakar Court of Appeal that Senegal had not undertaken necessary legislative reforms to implement the UN Torture Convention.[302]

Although many citations in the jurisprudence of the International Court of Justice of municipal judicial decisions are factual in nature, there are also examples of a normative character of such references. In the *Activities Carried Out by Nicaragua case* in the compensation judgment, the Court included an extensive passage – a paragraph – from the judgment of the US Supreme Court in *Story Parchment Company v. Paterson Parchment Paper Company* to support its reconstruction of a legal rule that damages may also be awarded in situations when assessing their exact amount is not possible.[303]

The International Court of Justice in the *Jadhav case* quoted passages from two Pakistani municipal rulings – that of the Supreme Court of Pakistan in *Said Zaman Khan et al v. Federation of Pakistan* and of the Peshawar High Court in *Abdur Rashid et al. v. Federation of Pakistan* – while discussing the scope and availability of judicial review of military courts' judgments. It was rather limited as, according to the Supreme Court, the review is only possible on "the grounds of *coram non judice*, without jurisdiction or suffering from *mala fides*, including malice in law only". Consequently, the Court could not conclude whether a violation of consular access rights could initiate a judicial review of military courts' decisions.[304]

Lastly, another interesting example of citing a municipal judicial decision appeared in the judgment of 11 December 2020 in the *Immunities and Criminal Proceedings case*, in which the World Court quoted a passage from the *Tribunal correctionnel* ruling of 27 October 2017.[305] The French court found Mr Obiang Mangue guilty of money laundering and, *inter alia*, ordered the confiscation of seized assets and the attached building. In relation to the latter, the French tribunal referred to the order on provisional measures rendered by the International Court of Justice of 7 December 2016, in which it indicated that the building at 42 Avenue Foch in Paris should be treated as diplomatic mission premises for the duration of the pendency of the international proceedings and France should

300 *Criminal Mutual Assistance case*, ¶ 28 and 147.

301 *Ibid.*, ¶ 37 and 129.

302 *Aut dedere aut judicare case*, ¶ 76.

303 *Activities Carried Out by Nicaragua case*, ¶ 35. In fact, in this case the ICJ cited the arbitral award in the *Trial Smelter case*, which included a passage from the US judgment. Nevertheless, the passage is a direct citation from the original decision of the US Supreme Court and the ICJ acknowledged the initial source.

304 *Jadhav case*, ¶ 141–2.

305 *Immunities and Criminal Proceedings case*, ¶ 36.

ensure its inviolability. In the cited passage, the French court stressed that the proceedings before the ICJ "make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty". It seems that by citing the municipal decision, the World Court wanted to highlight that a municipal court was aware of the order on provisional measures, took it into account in its reasoning, and in fact complied with the ruling of the Court. This specific acknowledgement from the International Court of Justice is yet another instance of the judicial dialogue it engages in with its domestic counterparts.

1.3.8 Capability of municipal courts in the field of international law

The only case so far in which the World Court was confronted with a question of the judicial capability of municipal courts in interpreting and applying international law was the *Interhandel case*. Switzerland claimed that American courts were "not in a position to adjudicate in accordance with the rules of international law". The ICJ did not share this opinion. Moreover, the International Court of Justice expressed great deference to national courts in response to this submission. It concluded: "[b]ut the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary".[306] This approach recognises that international law is administered by both international tribunals and domestic judiciary[307] and that both are well equipped to consider and determine questions of international law. It might be similarly another sign of recognition that the inter-judicial dialogue between the International Court of Justice and municipal courts is necessary and welcomed.

306 *Interhandel case*, p. 26.

307 Lauterpacht H., *Decisions of Municipal Courts as a Source of International Law*, 10 British YIL 65, 92–3 (1929).

2 Enforcement of ICJ decisions in municipal courts

It is a settled paradigm of international dispute resolution that there exists a qualitative separation between the adjudicative and post-adjudicative phase of the resolution of any controversy.[1] The first phase is the domain of different kinds of judicial and *quasi*-judicial institutions, either of permanent or *ad hoc* character. The latter is, however, highly unregulated and left mostly for the political realm. This paradigmatic separation is also evident in relation to the International Court of Justice, where the ICJ Statute governs all the aspects of the proceedings before the ICJ, but the rights and obligations of parties to a dispute or even third parties once a decision is rendered are regulated in the more political UN Charter and in quite a limited manner. During the deliberation, the United Nations Committee of Jurists assumed that "it was not the business of the Court itself to ensure the execution of its decisions".[2] This notion was further reaffirmed by members of the International Court of Justice. Judge Weeramantry, while dissenting from the majority opinion in *East Timor case*,[3] expressed the following opinion:

> [t]he Court, by its very constitution, lacks the means of enforcement and is not to be deterred from pronouncing upon the proper legal determination of a dispute it would otherwise have decided, merely because, for political or other reasons, that determination is unlikely to be implemented. The *raison d'être* of the Court's jurisdiction is adjudication and clarification of the law, not enforcement and implementation.

This fundamental distinction is even more visible in relation to international arbitration. Once an award is delivered, a tribunal ceases to exist and, thus, it is

1 Schulte C., *Compliance with Decisions of the International Court of Justice*, Oxford University Press 2004, p. 19. Rosenne describes this separation as fundamental, *see*: Rosenne Sh., *The Law and Practice of the International Court 1920–2005*, 4th ed., Vol. I., Martinus Nijhoff Publishers, Leiden/Boston 2006, p. 199.

2 *Documents of the United Nations Conference on International Organization*, San Francisco 1945, Volume XIV: United Nations Committee of Jurists, p. 617.

3 *East Timor* (Portugal v. Australia), Judgment, 1995 ICJ Rep. 90, 219 (Judge Weeramantry, dis. op.).

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even physically barred from any engagement in the compliance or enforcement process.[4]

Therefore, it is for other institutions and players to secure compliance with international judicial decisions. The choice of adequate mechanisms determines whether it is in essence a political or judicial process. In fact, the politicisation of the post-adjudicative phase is not only a problem for international law, but also for domestic legal regimes, although on a much smaller scale. A delivered judgment of a municipal court may require the involvement of the political arms of a State – law-enforcement agencies, or the legislature – or may raise issues relating to public policy or of a delicate political nature. This situation is trenchantly illustrated by a judgment of the US Supreme Court in *Brown v. Board of Education*[5] and by the subsequent quest of its enforcement. The ruling finding the segregation in American schools unconstitutional was strongly opposed in the southern states, and in order to implement it, armed forces and the National Guard had to become involved. But, as a less drastic example of this phenomenon, also certain decisions of constitutional courts require statutory or regulatory amendments and, consequently, depend on the good will and readiness to respect the authoritativeness of these courts by national parliaments. Possible incidents are "plainly exceptional", as normally the enforcement is rather automatic in national systems, "yet they serve to bring home the point that judgment enforcement is not in itself part of the judicial process, but rightly belongs to the political side of government",[6] and the international plane is not an exception.

The enforcement of international courts' decisions, including the International Court of Justice, should be at the beginning distinguished from compliance with the rulings of these courts. These two notions are closely intertwined or interrelated, as they are two sides of the same coin. Nevertheless, the compliance is a voluntary activity of a State against which a judgment or other decision of the ICJ has been rendered without the involvement of any institutionalised coercive apparatus.[7] This obviously does not include social or diplomatic pressure – phenomena which may not be characterised as institutional or falling within the scope of *imperium*. A typical example of compliance of a judgment-debtor State will be the payment of compensation in the amount ordered by the ICJ, or the performance of certain obligations indicated in a judgment of the World Court.

In contrast, the enforcement of international tribunals' decisions occurs when a State obligated under a judgment to carry out or refrain from a specified action does not voluntarily observe a rendered decision, explicitly defies it, or even takes steps directly against a judgment or an order. In such a situation, a judgment-creditor State utilises institutionalised coercive measures aimed at enforcing the

4 Rosenne Sh., *supra* fn. 1, p. 199.

5 *Brown v. Board of Education*, 347 U.S. 483 (1954).

6 Rosenne Sh., *supra* fn. 1, p. 198.

7 For Llamzon, compliance is the "acceptance of the judgment as final and reasonable performance in good faith of any binding obligation", *see*: Llamzon A.P., *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EJIL 815, 822 (2007).

judgment's specific actions or inactions.[8] A typical example of judgment enforcement at the domestic level is executive or enforcement proceedings, during which a party in a civil course of action may demand ordered sums of money by a reference to competent State authorities, which are generally courts and bailiffs. In more poetic language, the enforcement "refers to the transformation, by community means, of authoritative pronouncement into controlling reality".[9] The specifics of international law, including the lack of a centralised judiciary and coercive apparatus on the supranational plane, prevents the easy and prompt enforcement of international tribunals' decisions, as the international legal regime does not provide for an executive agency that is authorised to carry out the enforcement of those decisions. Primarily, neither international courts nor other international institutions are competent to carry out execution proceedings similar in character to national enforcement. It is a significant characteristic of international law that distinguishes it from national legal systems. But as Reisman points out,[10] this lack of centralism does not exclude in its entirety the possibility of functional enforcement. The ICJ and other international tribunals' decisions may generally be enforced by legally admissible means. International norms themselves supported by State practice and legal doctrine give judgment-creditor States certain instruments of enforcement that may be utilised depending on the circumstances of any particular case. From a practical and utilitarian perspective, "[n]ation-states, the primary repositories of effective power, are the most promising candidates for functional enforcement".[11] This includes their courts.

Despite these distinct characteristics of both enforcement and compliance with international judicial decisions, these institutions of international adjudication are not only interrelated, but also functionally interconnected, and their practical separation is sometimes impossible. Firstly, the enforcement of judicial decisions as such is always a subsequent step once compliance has not materialised. It is an answer to non-compliance. Notwithstanding, all legal systems, including the international legal regime, assume that compliance is an ordinary and most-common consequence of a judicial decision. Its lack is an aberration within the system, not a regular cause of action. Secondly, as the lack of compliance triggers enforcement, on the same footing the effective enforcement mechanisms contribute to the creation of a culture of compliance, as they induce such behaviour.[12] Finally, leaving aside the discussion of whether under international law the obligation

8 Rosenne defines the term "enforcement" as a judgment-debtor State's "involuntary act of compliance in consequence of some coercion", *see*: Rosenne Sh., *supra* fn. 1, p. 196.

9 Reisman W.M., *The Enforcement of International Judgments*, 63 AJIL 1, 6 (January 1969), or in other words in Reisman W.M., *Nullity and Revision. The Review and Enforcement of International Judgments and Awards*, Yale University Press 1971, p. 647: "enforcement denotes the specific transfer, by means of community coercion, of the values allocated to one participant through an authoritative decision".

10 Reisman W.M., *supra* fn. 9, p. 21.

11 *Ibid.*, p. 18.

12 Schulte C., *supra* fn. 1, p. 36.

to comply with the decisions of the ICJ is a passive[13] or an active[14] obligation, it may be argued that in fact the enforcement of international decisions through municipal courts is a form of compliance of a judgment-debtor State. Courts are State organs and, consequently, their actions are attributable to that State. When they are requested to adjudicate a certain claim on the basis that the International Court of Justice has already determined that a judgment-debtor State has violated its international obligations, then they are confronted with the question of whether to follow the lead of the ICJ, or not. If they resolve to do so, the courts actually and effectively comply with a given decision. Consequently, the compliance rooted in a domestic judicial body decision is simultaneously the compliance of a State in accordance with Article 94(1) of the UN Charter, despite the government's unfavourable stance. From the international law perceptive, any effective judicial enforcement may be perceived as a voluntary compliance of a State.

Nevertheless, it seems from the current state of affairs that both the compliance with decisions of the International Court of Justice and their enforcement are more a political rather than a legal matter.[15] Such a situation has a negative effect on the rule of law at the international level and in fact undermines the effectiveness and role of international law as such. In order to mitigate this state of affairs, a normative and structural shift is required. A shift from political institutions and processes to legal or even judicial proceedings and bodies. A shift from interest-driven, casuistic compliance and enforcement into independent, foreseeable, and semi-automatic measures based on law. This change in fact is already taking place within the international regime, although it is still in its infancy, as both States and even private individuals are attempting to engage and include municipal judicial bodies in the post-adjudicative phase of the proceedings conducted before the World Court. This chapter is dedicated to describing and examining this qualitative shift and presenting State practice in this regard.

At the beginning of this chapter on the enforcement of ICJ decisions through and by municipal courts, the legal basis of International Court of Justice decision enforcement through different kinds of international and domestic instruments and institutions is scrutinised. In this context, the relevant provisions of the UN Charter as well as customary rules are examined together with the practice of the organs of the United Nations. Other possible venues of enforcement are similarly discussed. Later, the practice of national courts as organs engaged or taken advantage of in the process of ICJ decision enforcement is described. This practise is analysed using the typology proposed by the present author.

13 Passive compliance shall be understood as an obligation not to act contrary to a ruling rendered by the World Court.

14 Active compliance connotes the duty to undertake all actions necessary to give effect to, or realise, all aspects of a judgment.

15 Rosenne Sh., *supra* fn. 1, p. 195.

2.1 International legal framework pertaining to the enforcement of ICJ decisions

Besides the explicit obligation to comply with decisions of the International Court of Justice expressed in Art. 94(1) of the UN Charter, there exists a complex network of international obligations relating to compliance with and enforcement of international judicial decisions. This network is rooted in customary rules, treaty provisions, and general principles of law, but those norms are fragmentary, chiefly based on political mechanisms and much narrower in scope than those existing within the League of Nations system.

2.1.1 Obligation to comply with ICJ decisions

Undoubtedly, the fundamental provision of the UN Charter in relation to the obligations of a judgment-debtor State is Article 94(1) indicating that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party". It imposes a positive obligation to comply with decisions of the International Court of Justice and shall be perceived as an aftermath of Article 37(2) of the *Convention for the Pacific Settlement of International Disputes*,[16] which specified that recourse to an international tribunal for dispute resolution implies a commitment to submit in good faith to a rendered decision.[17] Similar regulations were included in the *Covenant of the League of Nations*, of which Article 13(4) stipulated that

> [t]he Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith.[18]

The general obligation to comply with decisions of the ICJ is further reinforced by other provisions of the Charter and the ICJ Statute. Article 2(2) of the UN Charter stipulates that "[a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". Consequently, the treaty obligations envisaged in this instrument shall be exercised in good faith, including the duty to comply as expressed in Article 94. Moreover, the principle of *res judicata* provided for in Articles 59 and 60 of the ICJ Statute is of

16 *Convention (I) for the Pacific Settlement of International Disputes*, The Hague, 18 October 1907 UKTS 6 (1971) Cmnd. 4575, 1 AJIL 103 (1907).

17 "Recourse to arbitration implies an engagement to submit in good faith to the Award". The Hague Convention naturally referred to international arbitration rather than judicial settlement as in 1907 there did not exist any inter-State permanent international court. Nevertheless, the convention consists of general rules in relation to pacific settlement of disputes between States and many of its provisions have been later on included in statutes of permanent courts.

18 *Covenant of the League of Nations*, Paris, 28 April 1919, [1919] UKTS 4 (Cmd. 153).

relevance. These provisions stipulate that decisions of the World Court are legally binding and shall be considered as final and without appeal. Similarly, they are "definitive and obligatory".[19] Hence, the *res judicata* principle confers two obligations upon parties to a dispute. The negative one prevents them from relitigating the same matter already decided by the ICJ. The positive obligation, however, requires that a decision of an international tribunal be implemented as it stands.[20] In this context, a failure as well as a direct refusal to comply with a decision of the International Court of Justice constitutes a violation of international law and its most fundamental instrument – the UN Charter. Besides, a breach in such an instance is rather clear-cut and obvious, unlike in other instances of the UN Charter violations entangled in political controversies, e.g., the use of force. The character and seriousness of the such an infringement may imply and warrant an adequate reaction not only of a judgment-creditor, but of third-party States as well – also through their courts, if feasible.

Then, it is not only obligations deriving from the UN Charter and the ICJ Statute that create a treaty legal framework pertaining to the compliance and enforcement of decisions of the International Court of Justice. Similarly, both bilateral and multilateral international instruments contain relevant jurisdictional clauses that refer certain types of cases and disputes for settlement by the ICJ. Very often these clauses specify commitments of parties in relation to a rendered decision and its status. Particularly, special agreements or *compromis* submitting an already defined controversy for the adjudication by the World Court generally highlight that judgments are final and binding upon parties.[21] These treaty norms establish yet another layer of international obligations concerning international judicial decisions.

Notwithstanding, the duty to comply with decisions of the International Court of Justice is not only rooted in treaty obligations, either of multilateral or bilateral character, but derives similarly from customary rules and general principles of international law. Taking into account the jurisprudence of the International Court of Justice, international instruments already mentioned (e.g., the *Covenant of the League of Nations*) and the doctrine of international law,[22] an international

19 *Société Commerciale de Belgique* (Belgium v. Greece), Judgment, 1939 PCIJ Ser. A/B 78, p. 175; *Corfu Channel* (UK v. Albania), Compensation, Judgment, 1949 ICJ Rep. 244, p. 248 [*Corfu Channel case*].

20 Al-Qahtani M.M., *Enforcement of International Judicial Decisions of the International Court of Justice in Public International Law*, PhD thesis, University of Glasgow 2003, available at: theses .gla.ac.uk/2487 (4.01.2015), pp. 67–8.

21 *See* e.g.: *Special Agreement*, *Frontier Dispute* (Burkina Faso v. Niger), 20 July 2010, available at: http://www.icj-cij.org/docket/files/149/15985.pdf (28.12.2015) or *Special Agreement*, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), 24 July 2003, available at: http://www.icj-cij.org/docket/files/130/1785.pdf (28.12.2015).

22 Gattini A., *Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes* [in:] *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, ed. Fastenrath U., et al., Oxford University Press 2011, p. 1170; Jenks C.W., *The Prospects of International Adjudication*, Stevens & Sons Limited 1964, p. 663; Schachter O., *The Enforce-*

customary norm requiring compliance with international judicial decisions "in good faith"[23] and "in reasonable time"[24] may be deduced. This obligation means to "give effect to the Judgment of the Court",[25] but "with a view to avoiding its superficial implementation or otherwise circumventing it".[26] Thus, Article 94(1) of the UN Charter is to be perceived as a "conventional form to a rule which already exists as a general principle of customary international law".[27] Oppenheim[28] rightly indicates that it is an accepted principle of international law that rulings of international tribunals are binding upon parties. Hence, Article 94 of the UN Charter has merely a declaratory character. Furthermore, the general principle of good faith, being the basis for the *pacta sunt servanda* rule,[29] is analogously relevant to the enforcement of international decisions. It clarifies that each State is under the responsibility to identify and utilise "the most appropriate ways and means for ensuring that international law is applied at the national level"[30] and stipulates that States should refrain from any action frustrating the effect of a decision. This conclusion is further strengthened by the jurisprudence of arbitral tribunals[31] and permanent international courts. The Permanent Court of International Justice in the *Société Commerciale de Belgique case*[32] confirmed that "[i]f the awards are definitive and obligatory, it is certain that the Greek Government is bound to execute them and to do so as they stand".

This strong conviction about the binding power of international decisions and the obligation to comply with them is probably best illustrated in the anecdotal

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ment of International Judicial and Arbitral Decisions, 54 AJIL 1, 2 (January 1960), p. 2; Schulte C., *supra* fn. 1, pp. 29–30; Ajibola B.A., *Compliance with Judgments of the International Court of Justice* [in:] *Compliance with Judgments of International Courts*, eds. Bulterman M., Kuijer M., Martinus Nijhoff Publishers 1996, p. 17.

23 *Gabčíkovo-Nagymaros Project case*, ¶ 143; Rosenne Sh., *Practice and Methods of International Law*, Ocean Publications, Inc. 1984, p. 100.

24 *Avena Interpretation Request case*, ¶ 47.

25 *Gabčíkovo-Nagymaros Project case*, ¶ 143.

26 Paulson C., *Compliance with Final Judgments of the International Court of Justice since 1987*, 98 AJIL 434, 436 (2004).

27 Rosenne Sh., *supra* fn. 1, p. 210.

28 Oppenheim L., *International Law. A Treatise*, *Vol. II Disputes, War and Neutrality*, ed. Lauterpacht H., 7th ed., Longmans, Green and Co. 1952, p. 75; Oellers-Frahm K., *Article 94* [in:] *The Statute of the International Court of Justice. A Commentary,* eds. Zimmermann A., et al., 2nd ed., Oxford University Press 2012 [*ICJ Statute Commentary*], p. 187.

29 Ehrlich L., *Prawo narodów*, wyd. 2, K.S. Jakubowski 1932*,* p. 462. *See*: Article 26 VCLT and Article 2(2) UN Charter; Nantwi E.K., *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, A.W.Sijthoff 1966, pp. 65–81.

30 Institute de Droit International*, Resolution. The Activities of National Judges and the International Relations of Their States*, Milan, 7 September 1993, available at: http://www.justitiaetpace.org/idiE/resolutionsE/1993_mil_01_en.PDF (1.08.2015), preamble.

31 *Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), Judgment, 1960 ICJ Rep. 192, p. 214. For more details, *see*: Schachter O., *supra* fn. 22, fn. 4.

32 *Société Commerciale de Belgique* (Belgium v. Greece), Judgment, 1939 PCIJ Ser. A/B 78, p. 176.

letter of the then-US Secretary of State Hughes to the tribunal in the *Norwegian Shipowners' Claims case*.[33] He apparently stated:

> I disagree completely with the decision the Court has made. I think it is very wrong and creates new ideas of international law, but I believe very strongly that States should comply with an order of a tribunal to which they gave the rights to render a judgment in their case. Therefore, here is the check with the money that the Court asked us to pay, but we pay it under protest.[34]

Finally, the general obligation to comply with an international judicial decision and its effects in the post-adjudicative phase of a dispute has been addressed by the Iran-United States Claims Tribunal.[35] This Tribunal, when considering Article IV(1)[36] of its constituting international instrument almost identical with Article 60 of the ICJ Statute stipulating that "the judgment is final and without appeal", concluded that obligation to comply also implies the existence of enforcement:

> Certainly, if no enforcement procedure were available in a State Party, or if recourse to such procedure were eventually to result in a refusal to implement Tribunal awards, or unduly delay their enforcement, this would violate the State's obligations under the Algiers Declarations. It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto. If procedures did not already exist as part of the State's legal system they would have to be established, by means of legislation or other appropriate measures. Such procedures must be available on a basis at least as favourable as that allowed to parties who seek recognition or enforcement of foreign arbitral awards.[37]

This approach to States' obligations associated with the *res judicata* principle is particularly illuminating as it directly addresses the issue of national enforcement of international judicial decisions, also through municipal court proceedings.

33 *Norwegian Shipowners' Claims* (Norway v. USA), The Hague, 13 October 1922, I UNRIAA 307.

34 *Cited after*: Sohn L., *The Post-Adjudicative Phase. General Discussion* [in:] *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, eds. Peck C., Lee R.S., Martinus Nijhoff Publishers 1996, pp. 361–2.

35 *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, 19 January 1981, 20 ILM 223, 230 (1981); 1 Iran-US CTR 9 (1983).

36 "All decisions and awards of the Tribunal shall be final and binding".

37 *Islamic Republic of Iran v. United States*, Case No. A/21, 14 Iran-US CTR 324, 331–32 (1987).

2.1.2 Binding force of ICJ decisions

Discussing the obligation to comply and associated with it the notion of the enforcement of judicial decisions of the International Court of Justice, the scope and contents of this obligation warrant addressing in the first place. As to the subjective scope of the duty to comply, unquestionably it refers only and exclusively to States. Pursuant to Articles 3 and 4 of the UN Charter only these subjects of international law are entitled to be members of the United Nations. Additionally, Article 34(1) of the ICJ Statute specifies that only States may be parties in ICJ proceedings. The binding force *ratione personae* of ICJ decisions is further limited through Article 94(1) of the UN Charter stipulating that a decision issued in a specific case is binding only on State parties to a particular proceeding. In comparison to the Covenant of the League of Nations, the binding force *ratione personae* under the present legal framework is narrower. Guillaume, for example, highlights the difference between Article 94(1) of the UN Charter and Article 13(4) of the Covenant as the former in fact limits the *res judicata* effect of ICJ decisions. The duty to comply under the UN Charter is directed only to a State party to a case, whereas the Covenant "in a less appropriate wording" obliges *all* members of the League of Nations to carry out in full good faith the decisions of the World Court.[38]

Notwithstanding, this limiting effect of the present legal regime may be somewhat remedied when relevant provisions are not interpreted and applied in isolation. In relation to the binding force *ratione personae* some attention should likewise be paid to Article 2(5) of the UN Charter, which creates a positive obligation for United Nations Member States to "give the United Nations every assistance in any action it takes in accordance with the present Charter", and a negative duty to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action". It requires all Member States to cooperate with the UN, *ergo* with the International Court of Justice as a principal organ of the United Nations. Consequently, as Rosenne argues, the aforementioned provision of the UN Charter may be perceived as a basis for the assistance of third States to the ICJ in securing compliance with its decisions.[39]

When one refers to the binding force of decisions of the International Court of Justice, a significant question of the material scope of the obligation to comply and, consequently, the scope of enforcement of rulings rendered by the World Court is unavoidable. The *ratione materiae* parameters are of utmost importance as they delimit, firstly, the duty to comply of a judgment-debtor State. They specify exactly which part or parts of a judgment have to be implemented. But they also have a protective function for a judgment-debtor as, secondly, they delineate the range of means during the enforcement process.

38 Guillaume G., *Enforcement of Decisions of the International Court of Justice* [in:] *Perspectives on International Law*, ed. Jasentuliyana N., Kluwer Law International, 1995, p. 276, fn. 4.

39 Rosenne Sh., *supra* fn. 1, p. 207.

The most conservative approach limits this obligation only to the *dispositive* of judgments, leaving aside reasons or motivations of a particular ruling. Such a position was presented by the United States after the judicial defeat in its Consular triad.

> The United States had addressed those issues on the understanding that it had an international legal obligation to comply with the operative paragraphs of the Court's judgment; however, it considered that it had no international legal obligation to accept the underlying reasoning or treaty interpretation of the Court for other purposes.[40]

This restrictive approach is, at first sight, present in the case-law of the World Court. In the *Interhandel case*, "[t]he Court notes in the first place that to implement a decision is to apply its operative part".[41] Similarly, the Permanent Court of International Justice explained:

> it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned,

but at the same time, it clarified:

> It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion.[42]

The understanding that only a disposition of an international judicial decision is binding, nevertheless, seems too restrictive. The practice of the International Court of Justice indicates that the wording of a *dispositif* is very concise and kept to the minimum, while many related issues are described and explained in the reasons of decisions, e.g., in the *Avena case*, the ICJ in the operative part of the judgment explicitly referred to the parts of the reasoning in order to describe the obligations of the United States to provide adequate reparation.[43] Although such a direct reference is not a common feature of ICJ rulings, nevertheless it clearly indicates that the restrictive division of the operative part and motives of judgments is impractical, as they often interrelate and are drafted in close connection with each other. The proper understanding and implementation of a *dispositif* is dependent on the reasoning part of the ruling. The International Court of Justice

40 *A Dialogue at the Court. Proceedings of the ICJ/UNITAR Colloquium Held on the Occasion of the Sixtieth Anniversary of the International Court of Justice at the Peace Palace on 10 and 11 April 2006*, ICJ 2007, p. 31.

41 *Interhandel case*, p. 28.

42 *Polish Postal Service in Danzig*, Advisory Opinion, 1925 PCIJ Series B No. 11, pp. 29–30.

43 *Avena case*, ¶ 153(9) and (11).

distances itself from the narrow understanding of the binding force of a decision as limited only to dispositive parts. It stated, on the application of the Philippines to intervene in proceedings between Indonesia and Malaysia, that:

> the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.

A similar approach has been taken by arbitral tribunals. The Anglo-French tribunal, for example, was of the following opinion:

> [t]he Court of Arbitration considers it to be well settled that in international proceedings the authority of *res judicata*, that is the binding force of the decision, attaches in principle only to the provisions of its *dispositif* and not to its reasoning. In the opinion of the Court, it is equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*.[44]

The specific interrelation between reasons and a disposition of a judicial decision is also stressed by the legal doctrine.[45] Rosenne highlighted, for example, the link between parties' submissions and a final ruling to conclude that

> [t]he *res judicata* does not derive from the operative clause of the judgment, which confined itself to stating which submissions of the parties were rejected or accepted and to what extent, but from the reasons in point of law given by the Court.[46]

Consequently, the reasoning directly concerning the subject-matter of a dispute forms an integral part of a decision that is binding upon State parties and in relation to which the obligation of compliance exists. The correlation between all essential elements of a decision of an international tribunal, and the ICJ in

44 *Delimitation of the Continental Shelf* (UK v. France) (1978), 54 ILR 139, 170 (1979).

45 Bernhardt R., *Article 59* [in:] *The Statute of the International Court of Justice. A Commentary*, eds. Zimmermann A., et al., Oxford University Press 2006, p. 1239: "[t]he *res judicata* itself is, however, identical in its scope to what is covered by the biding force of the decision, namely the operative part including the reasons relevant for its understanding"; Oellers-Frahm K., *Article 94* [in:] *ICJ Statute Commentary*, p. 192: "State must perform the obligations in order to achieve the consequences resulting from the operative part of the decision including the respective *ratio decidendi*"; Mosler H., *Supra-National Judicial Decisions and National Courts*, 4 Hastings ICLR 425, 444–45 (1980–1); Ehrlich L., *supra* fn. 29, p. 465; Gattini A., *supra* fn. 22, pp. 1171–2.

46 Rosenne Sh., *supra* fn. 1, p. 1603.

particular, is "intimate and inseparable".[47] In this vein, the arbitral tribunal in the *Pius Found case* of 1902 explained:

> [c]onsidering that all the parts of the judgment or decree concerning the points debated in litigation enlighten and mutually supplement each other and that they all serve to render precise the meaning and the bearing of the dispositif and to determine the points upon which there is res judicata and which thereafter cannot be put in question.[48]

Such an understanding of the binding force *ratione materiae* of decisions of the International Court of Justice is even more apparent in territorial and maritime disputes. It is the common practice of the Court to provide delimitation details and relevant geographical coordinates together with relevant maps in *motifs* rather than in the operative part of a judgment.[49] They acquire the authority of *res judicata* in the same manner as the *dispositif*.

Once it has been determined which parts of international judicial decisions and to what extent are binding upon State parties to the proceedings, it is similarly essential to assess whether the binding force *ratione materiae* applies to all decisions of the International Court of Justice or is rather limited to judgments only. The literal meaning of Article 94(1) of the UN Charter indicates that the obligation it imposes applies to all rulings of the Court, not only final judgments,[50] particularly by the reference to the more generic term "decisions". When compared with the wording of Article 94(2) of the UN Charter, this conclusion is further reinforced as the latter provision concerns only judgments and envisages its enforcement through political means. Consequently, the obligation to comply as well as the binding force concerns all types of ICJ decisions, including orders. This understanding was confirmed by the Court in the *LaGrand case*,[51] in which the ICJ interpreted the scope of Article 94(1) and applied it to an order on provisional measures.

2.1.3 Enforcement of ICJ decisions in the UN Charter

As far as the enforcement of ICJ decisions is concerned, the matter is regulated in Article 94(2) of the UN Charter, according to which:

47 Al-Qahtani M.M., *supra* fn. 20, p. 109.

48 *Pious Found Case* (USA v. Mexico), PCA, 14 October 1902, 9 UNRIAA 1, 12; translation from French provided after: Al-Qahtani M.M., *supra* fn. 20, p. 103.

49 *Boundary between Cameroon and Nigeria Case*; *Maritime Dispute* (Peru v. Chile), Judgment, 2014 ICJ Rep. 3.

50 Rosenne Sh., *supra* fn. 1, p. 207; Oellers-Frahm K., *Article 94* [in:] *The Charter of the United Nations. A Commentary*, eds. Simma B., et al., 3rd ed., Oxford University Press 2012 [*UN Charter Commentary*], p. 1960.

51 *LaGrand case*, ¶ 108–9.

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Surprisingly, this regulation is the only mechanism of ICJ decision enforcement by the United Nations organs provided for in positive law. Its literal meaning evidences, however, that this mechanism is in reality particularly limited, thus impractical and ineffective. First of all, in contrast to Article 94(1) of the UN Charter already scrutinised, Article 94(2) deals solely with judgments and does not extend over other ICJ decisions. Secondly, the provision excludes the possibility of addressing the situation of non-compliance with ICJ judgments by the UN Security Council *ex officio* or on the request of any UN Member-State or even the International Court of Justice itself. The relevant procedure may only be initiated by a State party to a judgment facing the non-compliance of the other party. Thirdly, the UN Security Council is not obligated under the UN Charter to take any measures to secure respect for ICJ judgments, even if an authorised State files a relevant request. The UN Charter equips the UN Security Council with full discretion in this regard as emphasised by the phrase "if it deems necessary".[52] Finally, the general regulations governing voting principles and the so-called *veto* powers in the UN Security Council are also applicable to votes on resolutions making recommendations or deciding upon measures "to be taken to give effect to the judgment". It implies that a State being a UN Security Council member is not obliged to refrain from voting, even if a request filed under Article 94(2) concerns this State, and obviously the permanent members are entitled to take advantage of their *veto* powers.[53] Article 27(3) of the UN Charter provides that a party to a dispute shall abstain from voting in the UN Security Council, but only in relation to decisions "under Chapter VI, and under paragraph 3 of Article 52". Article 94 of the UN Charter is situated in Chapter XIV, consequently, the obligation to abstain from voting does not cover the situation of non-compliance with ICJ judgments.

Against this background, parallel regulations included in the Covenant of the League of Nations seem more efficient and wider in their application. Article 13(4) provided that

> In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

52 According to Tanzi, it stresses "the discretionary character of the authority of the Council in the matter" in Tanzi A., *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EJIL 539, 541 (1995). Nevertheless, in the opinion of Oppenheim it may be argued that the UN Security Council is, indeed, obligated to act on the request of a judgment-creditor State. He argues that the utilisation of the phrase "if it deems necessary" indicating the discretion on the side of UN Security Council applies only to the choice between two possible actions to be taken: recommendations or decisions, *see*: Oppenheim L., *supra* fn. 28, p. 76.

53 Oellers-Frahm K., *Article 94* [in:] *UN Charter Commentary*, pp. 1969–70.

Firstly, this provision covered all inter-State international decisions, rendered either in judicial or arbitration proceedings, either by a permanent or *ad hoc* tribunal. Furthermore, the competence of the Council was independent of any other subject of international law and, therefore, it could adopt a relevant resolution even without a formal request, *ex officio*. Lastly, the Council did not enjoy such a wide discretionary power as the UN Security Council does today. It had a legal, positive obligation to take necessary steps in the event of non-compliance ("the Council shall propose"). As Schulte argues "there was a duty of the League of Nations Council to examine the conduct of the litigants and act *propria motu* in the moment there was non-compliance".[54] In relation to the authority of the UN Security Council in this regard, no obligation exists.

Furthermore, the mechanism of ICJ judgment enforcement through the UN Security Council – a political organ – is decidedly politicalised already in its design. It is evident in the practice of Article 94(2) application by the Council. In its history, it has so far never made any recommendations or decided upon measures to be taken to give effect to an ICJ judgment, although relevant requests have been submitted.[55] As it was observed:

> [c]learly, … the enforcement of ICJ judgments involves quintessentially political acts by both parties and the Security Council, in which the Court itself has little involvement and over which it has no power. It is thus at least partly improper to blame the ICJ (as some commentators sometimes do) when states do not comply with its decisions, as the Charter assigns the responsibility to enforce to the Security Council.[56]

The most glaring example[57] of this politicisation of the ICJ judgment enforcement procedure of the UN Security Council concerns the repercussions of the famous *Nicaragua case*.[58] The International Court of Justice in its judgment of 27 June

54 Schulte C., *supra* fn. 1, p. 20.

55 *See*: *Repertory of Practice of United Nations Organs*, Volume VI, Supplement No. 8, Article 94; *Repertory of Practice of United Nations Organs*, Volume VI, Supplement No. 9.

56 Llamzon A.P., *supra* fn. 7, p. 822. Curtis Bradley named it "discretionary political enforcement", *see*: Bradley C., Damrosch L.F., Flaherty M., *Discussion*, Medellin v. Dretke: *Federalism and International Law*, 43 Columbia J. of Transnational Law 667, 681 (2005).

57 It was also the "first direct invocation of Article 94", *see*: Rosenne Sh., *supra* fn. 1, p. 257, and the only one so far.

58 It has been raised that Article 94(2) of UN Charter was also used in two additional cases: the *Anglo-Iranian Oil case* of 1951 and the *Bosnia Genocide case* of 1993, *see*: Tanzi A., *supra* fn. 52, p. 540. Nevertheless, in the opinion of the author, both these instances of possible attempts to enforce ICJ decisions through the UN Security Council shall not be deemed as such for a few reasons. Firstly, both of them dealt with orders indicating provisional measures and Article 94(2) explicitly and exclusively applies to the enforcement of judgments of the ICJ. Secondly, neither the United Kingdom nor the UN Security Council's resolution 819 adopted on the request of Bosnia and Herzegovina referred to Article 94(2) as the basis of the UN Security Council actions. Therefore, the *Nicaragua case* seems to be the only example of an attempt to enforce the ICJ judgment by means of the mechanism envisaged in the UN Charter.

1986 decided that the United States of America violated the customary international law and bilateral treaties with Nicaragua by "training, arming, equipping, financing and supplying the *contra* forces" fighting against the central government as well as conducting certain acts of violence on the territory of Nicaragua.[59] In addition, the ICJ highlighted that the USA "is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations".[60] Due to non-compliance, Nicaragua filed a relevant request under Article 94(2) of the UN Charter with the UN Security Council. The draft resolution was prepared and sponsored by Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates making "an urgent and solemn call for full compliance with the judgment of the International Court of Justice".[61] It has never been adopted "owing to the negative vote of a permanent member of the Council" – the United States of America.[62] Nicaragua repeated the relevant request,[63] but again the negative vote of the United States did not allow the adoption of the resolution.[64] After this failure, no further attempts have ever been undertaken to engage the Security Council in the enforcement or post-adjudicative process relating to decisions of the International Court of Justice.

As to the nature and character of recommendations and measures that could be adopted by the UN Security Council under Article 94(2) of the UN Charter, again this matter is left solely to the discretionary powers of the UN Security Council. The Charter itself does not provide any guidance in this regard. Also, the practice is lacking as no recommendations or measures have been ever adopted. The only catalogue of the latter, though not exclusive, is provided in Articles 41 and 42 of the UN Charter. Those are, however, measures to be taken under Chapter VII pertaining to "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression" that seem, in most cases, inappropriate to address instances of non-compliance with decisions of the World Court. They may even seem "drastic and disproportionate".[65]

Besides the measures to be employed by the UN Security Council according to Article 94(2) of UN Charter, its competence also covers making recommendations in order to give effect to judgments of the World Court. It is obvious that

59 *Nicaragua case*, ¶ 292(3)–(11).

60 *Ibid.*, ¶ 292(12).

61 UN Security Council, *Draft Resolution*, 31 July 1986, UN Doc. S/18250.

62 UN Security Council, *Provisional Verbatim Record of 2704 Meeting*, 31 July 1986, UN Doc. S/PV.2704.

63 UN Security Council, *Letter Dated 17 October 1986 from the Permanent Representative of Nicaragua to the United Nations Addressed to the President of the Security Council*, 20 October 1986, UN Doc. S/18415: "I have the honour to request an emergency meeting of the Security Council, in accordance with the provisions of Article 94 of the Charter, to consider the non-compliance with the Judgment of the International Court of Justice dated 27 June 1986 concerning 'Military and Paramilitary Activities in and against Nicaragua'".

64 UN Security Council, *Provisional Verbatim Record of 2718 Meeting*, 28 October 1986, UN Doc. S/PV.2718.

65 Tanzi A., *supra* fn. 52, p. 562.

such recommendations, although suggested by the Security Council, are not binding on a State concerned that may disregard them without any legal consequences. Thus, the recommendations should be comprehended as diplomatic means rather than a coercive measure, although diplomatic pressure should not be assessed as an ineffective approach. Nevertheless, even in relation to such soft methods of encouraging States to respect their obligations under the UN Charter pertaining to rulings rendered by the ICJ, no practice of the UN Security Council is available up to this day.

Furthermore, any resolution of the UN Security Council adopted under Article 94(2) should be assessed in the light of the obligations of the UN Member States envisaged in Article 25 of the UN Charter. These obligations require Member States to "accept and carry out" UN Security Council decisions without distinction. They are not dependent on the existence of any threat to the peace, breach of the peace, or act of aggression. States' commitments under Article 25 are independent from Chapter VII obligations and concern all resolutions of the UN Security Council, including those adopted pursuant to Article 94(2).[66] This understanding is further supported by the practice of the Security Council itself that refers to Article 25 not only in relation to measures ordered pursuant to Chapter VII.[67] Additionally, Article 59 of the ICJ Statute, governing the scope of *res judicata* of ICJ decisions together with Article 94(1) of the UN Charter regulating the obligation to comply, do not provide any legal basis for a third party to assist a judgment-creditor State in enforcing rulings of the World Court. Nevertheless, a relevant resolution of the UN Security Council adopted under Article 94(2) may extend the application of international obligations as pronounced by the ICJ by virtue of the said Article 25 of UN Charter, which reads:

> [t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

This obligation, however, is limited only to decisions of the UN Security Council, as the literal meaning of Article 25 provides for, and does not extend to recommendations. Therefore, a resolution of the UN Security Council adopted under Article 94(2) by virtue of Article 25 indicating measures to be undertaken by all Member States or some of them in response to non-compliance may extend indirectly the legal effects of a judgment of the International Court of Justice. Such

66 Schachter O., *supra* fn. 22, p. 22: "If the Council took such a decision under Article 94(2), it would be binding under Article 25 on all Members and would prevail over their obligations under any other international agreement or customary international law". *See also*: Oppenheim L., *supra* fn. 28, p. 76.

67 E.g., UN Security Council, *Resolution 743 (1992). Socialist Federal Republic of Yugoslavia*, 21 February 1992, UN Doc. S/RES/743 (1992): "*Recalling also* the provisions of Article 25 and Chapter VIII of the Charter, …

12. *Requests* all States to provide appropriate support to the Force [UN Protection Force], in particular to permit and facilitate the transit of its personnel and equipment".

a resolution will be a legal basis for States not involved in a dispute resolved by the World Court to engage in enforcement efforts. A possible resolution may be of a general nature, calling parties to comply with a judgment and other Member States to assist in the compliance process, or indicating specific measures to be taken. In case of open defiance, the UN Security Council may engage Member States in the enforcement by ordering, e.g., the seizure of assets or bank account freezing in order to secure payments of reparations rendered by the International Court of Justice.

Although such a possibility exists under the current legal framework of the enforcement mechanisms provided for in the UN Charter, it has never been employed so far. Independently from these considerations, from the perspective of the international rule of law and the strengthening of the effectiveness of the International Court of Justice, the UN Security Council is in the position to develop, on the basis of Articles 94(2) and 25 of the UN Charter, a community enforcement mechanism – although quite distinct from enforcement in domestic jurisdictions. Such an apparatus would be particularly valuable and necessary in situations when the World Court determines that a breach of *erga omnes* obligations has occurred and the non-recognition of an illegal act by all members of the international community is required.[68]

2.1.4 Other methods of enforcement

As already explained, the mechanism of the ICJ judgment enforcement through the UN Security Council currently in force under the UN Charter is insufficient, ineffective, and decidedly politicalised and does not provide a judgment-debtor State with a real possibility to demand and defend its rights. Consequently, other possible measures in different fora to be employed by an aggrieved State in order to enforce ICJ decisions are addressed in this section. In fact, States have already been involved in the search for other means of securing the enforcement of beneficial decisions of international tribunals. Their practice as well as writings of acknowledged scholars in the domain of international law provide certain suggestions in this regard. The below-discussed instances clearly indicate that the mechanism provided for in Article 94(2) of the UN Charter foreseeing a recourse to the UN Security Council is not an exclusive means of the enforcement of ICJ decisions and has never been meant to be.[69]

68 See e.g., *Wall Advisory Opinion*, ¶ 163(3)(D) and UN General Assembly, *Resolution 56/83. Responsibility of States for Internationally Wrongful Acts*, 12 December 2001, UN Doc. A/RES/56/83, Annex, *Articles on Responsibility of States for Internationally Wrongful Acts*, Article 41(2): "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation".

69 Al-Qahtani M., *The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions*, 15 LJIL 781, 782 (2002): "this Article [referring to Article 94(2) of UN Charter] provides no exclusive authority for the Security Council to be the only ultimate and sole enforcer of the ICJ decisions"; Mosler H., Oellers-Frahm K., *Article 94* [in:] *The Charter of the United*

First, State practice within the United Nations system pertaining to other channels of the enforcement of ICJ decisions is scrutinised. The veto of the United States in the UN Security Council in relation to the *Nicaragua case* forced the Nicaraguan government to turn to the UN General Assembly for political support and diplomatic pressure. As its representative explained:

> [t]he illegal veto cast by the United States in the Security Council on Tuesday, 28 October, has compelled us to request the inclusion, as an urgent matter, of a new item on the agenda of the forty-first session of the General Assembly.[70]

The main objection of the United States' delegation focused on the fact that

> the new item proposed by Nicaragua is not an appropriate item for consideration by the General Assembly. In regard to judgements of the International Court of Justice, Article 94, paragraph 2, provides that a party may have recourse to the Security Council. There is no mention of any role for the General Assembly.[71]

Nevertheless, the Assembly did not share these doubts and the proposed resolution urgently calling "for full and immediate compliance with the judgment"[72] was adopted by 94 votes against 3 (USA, Israel, and El Salvador) with 47 abstentions. Therefore, the practice of States acting within the United Nations has plainly established that the enforcement mechanism under Article 94(2) of UN Charter is only one of the options, indisputably not the sole means to this end. Furthermore, under Articles 10 and 14 of the UN Charter the UN General Assembly is competent to scrutinise a case of non-performance of a decision of the World Court and to adopt recommendations giving effect to a particular decision.[73]

Additionally, enforcement within the United Nations system is possible under the existing legal regime through specialised agencies and related organisations.

Nations. A Commentary, eds. Simma B., et al., 2nd ed., Oxford University Press 2002, p. 1178; Rosenne Sh., *supra* fn. 1, p. 248.

70 UN General Assembly, *Provisional Verbatim Record of 53rd Meeting*, 6 November 1986, UN Doc. A/41/PV.53, p. 46.

71 *Ibid.*, p. 66.

72 UN General Assembly, *Resolution 41/31. Judgment of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and against Nicaragua: Need for Immediate Compliance*, 3 November 1986, UN Doc. A/RES/41/31.

73 Schachter O., *supra* fn. 22, p. 24 and Magid P., *The Post-Adjudicative Phase. Presentation* [in:] *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, eds. Peck C., Lee R.S., Martinus Nijhoff Publishers 1996, p. 331; Kapoor S.K., *Enforcement of Judgments and Compliance with Advisory Opinions of the International Court of Justice* [in:] *International Court in Transition. Essays in Memory of Professor Dharma Pratap*, eds. Dhokalia R.P., Nirmal B.C., Chugh Publications 1994, p. 307.

For example, the Constitution of the International Labour Organization[74] provides for a particular procedure with the involvement of the International Court of Justice in the event of alleged non-observance of conventions adopted by the ILO Conference. Any complaint filed by a Member State is examined by a commission of inquiry that prepares a report containing its findings and recommendations.[75] A government concerned may accept recommendations from a report or refer an initiating complaint to the World Court.[76] Once ICJ renders a decision and non-compliance follows, then the enforcement phase is initiated that is as envisaged in the ILO Constitution:

> In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.[77]

In the case of disputes arising within the International Labour Organization, the primary role of securing compliance rests with the Governing Body.

More direct and severe measures for non-compliance with decision of the International Court of Justice are provided for in the *Chicago Convention*[78] establishing the International Civil Aviation Organization.[79] Firstly, pursuant to Article 88 of the Convention, the ICAO Assembly is entitled to suspend the voting rights of any Member State not acting in conformity with ICJ decisions rendered under the *Chicago Convention*.[80] Secondly, the Convention directly obligates Member States to participate in the enforcement of ICJ decisions:

> Each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article.[81]

In addition to universal multilateral treaties, similarly some regional international agreements specify certain measures, procedures, and institutions to give full

74 *Constitution of the International Labour Organization*, 1 April 1919, 15 UNTS 40.
75 *Ibid.*, Article 28.
76 *Ibid.*, Article 29.
77 *Ibid.*, Article 33.
78 *Convention on International Civil Aviation*, Chicago, 7 December 1944, 15 UNTS 295 [*Chicago Convention*].
79 Guillaume G., *supra* fn. 38, p. 276, fn. 4.
80 *Chicago Convention*, Article 88 in connection with Article 86.
81 *Ibid.*, Article 87.

effect to ICJ decisions. Article 50 of the *Pact of Bogota*,[82] for example, imposed on parties an obligation to refer a situation of non-compliance with rulings of the International Court of Justice firstly to a Meeting of Consultation of Ministers of Foreign Affairs that may agree on "appropriate measures". A similar mechanism is available to an injured State under the European Convention for the Peaceful Settlement of Disputes of 1957,[83] where the Committee of Ministers of the Council of Europe may make recommendations to secure compliance.

The above examples demonstrate that the UN Security Council is not the sole enforcer of decisions of the World Court as multilateral treaties envisage additional modes of enforcement of decisions of the ICJ. Although the operations and functioning of the International Court of Justice are predominantly governed by the UN Charter and the ICJ Statute, the post-adjudicative phase and the enforcement process are regulated also in other international instruments.

As the "[e]nforcement of a court's judgment that has 'binding force' involves quintessential judicial activity",[84] it is not surprising that also the International Court of Justice itself is competent to play the more vital role in the post-adjudicative phase of proceedings under the current international legal framework. Firstly, such a situation is possible when the parties have conferred onto the ICJ additional powers to foster compliance. A boundary dispute between Burkina Faso and Mali is a good illustration in this regard. Both parties agreed in their special agreement referring the case to the ICJ that the demarcation process of the frontier as determined by the World Court would be assisted by three experts appointed by the Court. The ICJ did not have any objections as to its extended role at the enforcement stage and did name these specialists, as:

> there is nothing in the Statute of the Court nor in the settled jurisprudence to prevent the Chamber from exercising this power, the very purpose of which is to enable the Parties to achieve a final settlement of their dispute in implementation of the Judgment which it has delivered.[85]

Nevertheless, as the jurisdiction of the International Court of Justice is based upon the consent of States, the engagement of the ICJ in dispute settlement implementation also requires such consent expressed in a special agreement between parties.

But there are also other means of involvement of the International Court of Justice in the enforcement of its own decisions envisaged in the UN Charter and the ICJ Statute. Under Article 61(3) of its Statute, the ICJ may require compliance with its initial judgment before revision proceedings are admitted, thus inducing compliance. The provision of the ICJ Statute to that effect is additionally

82 *American Treaty on Pacific Settlement (Pact of Bogota)*, Bogota, 30 April 1948, 30 UNTS 55, Article L.

83 *European Convention for the Peaceful Settlement of Disputes*, Strasbourg, 29 April 1957, 320 UNTS 243, Article 39(2).

84 *Medellin v. Texas*, 552 US 491, 551 (2008) (Breyer, Souter, & Ginsburg, diss.).

85 *Frontier Dispute* (Burkina Faso v. Mali), Order of 9 April 1987, 1987 ICJ Rep. 7, p. 8.

supplemented by Article 99(5) of the ICJ Rules that provides that "[i]f the Court decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly". As is noted in the legal scholarship

> [t]he Court under this provision, can formally order the recalcitrant state to comply with its previous judgment … In fact, the essence of this provision is to impose a "sanction" by the Court against a party seeking revision, which had failed to comply with the judgment in question.[86]

Unfortunately, this measure of induced compliance is rather limited as it may be utilised only in relation to a State party seeking revision of a judgment, not the other party.

Furthermore, the ICJ Statute itself provides for the direct involvement of the World Court in the post-adjudicative phase if parties are not able to agree on the scope and modalities of compliance. Firstly, Article 60 stipulates that "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party". This competence refers to all types of judgments of the ICJ, not only the ones on merits.[87] The relevant request may be filed with the International Court of Justice unilaterally. The legal threshold for the admissibility of the interpretation proceedings is rather low, as a moving party needs only to indicate the existence of a dispute relating to the meaning of a preliminary decision of the Court, precisely its operative parts.[88] Secondly, a party may initiate the revision proceedings under Article 61 of the ICJ Statute, but these types of proceedings are more complex, both from procedural and material perspectives. "[T]he Statute and the Rules of Court foresee a 'two-stage procedure' … The first stage of the procedure for a request for revision of the Court's judgment should be 'limited to the question of the admissibility of that request'".[89] The *prima facie* justification for the revision is, however, rather difficult to provide as Article 62 of the ICJ Statute obligates the requesting Party to prove

86 Al-Qahtani M., *supra* fn. 69, p. 797.

87 *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), Judgment, 1999 ICJ Rep. 31, ¶ 10: "By virtue of the second sentence of Article 60, the Court has jurisdiction to entertain requests for interpretation of any judgment rendered by it. This provision makes no distinction as to the type of judgment concerned. It follows, therefore, that a judgment on preliminary objections, just as well as a judgment on the merits, can be the object of a request for interpretation".

88 *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thailand), Judgment, 2013 ICJ Rep. 281, ¶ 34.

89 *Application for the Revision of the Judgment of 11 July 1996 in the Case Concerning the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment, 2003 ICJ Rep. 7, ¶ 15.

> the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

Once the admissibility prerequisites for the revision proceedings are met, then the procedure on the scope and subject-matter of the judgment modification may proceed. Finally, which is of the highest importance, the ICJ has the jurisdiction to adjudicate on both applications for interpretation and revision alike without any additional consent of any party to the initial proceedings. The consent to the jurisdiction once granted, in whatever form, applies simultaneously to these post-adjudicative proceedings.

Additionally, the World Court, in the exercise of its judicial function, may and in fact does provide guidelines or specify modes of implementation of its decisions. A good example may be found in the *Boundary between Cameroon and Nigeria case*, in which the ICJ awarded populated territories in question to Cameroon. In its judgment, it stated:

> [t]he Court notes that Nigeria is under an obligation in the present case expeditiously and without condition to withdraw its administration and its military and police forces from that area of Lake Chad which falls within Cameroon's sovereignty and from the Bakassi Peninsula.[90]

As these areas were controlled by Nigeria, the International Court of Justice did not stop at adjudicating that the title to these territories lies with Cameroon but felt compelled to indicate obligations relating to the implementation of this particular decision to a judgment-debtor State. In other similar instances of territorial and boundaries disputes, the implementation of a judgment is predominantly reached by diplomatic and political means, often with the involvement of international organisations[91] rather than guided by the Court.

Moreover, the practice of the ICJ indicates that the Court is competent and willing to declare non-compliance with its interlocutory orders in the final judgment settling a dispute. It refers in particular to violations of provisional measures during the *litispendence* of a case before the World Court. In the *LaGrand case*, the ICJ was explicitly requested to pronounce that the USA "violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999".[92] The Court did not refrain from exercising its judicial function, as it stated: "under these circumstances the Court concludes that

90 *Boundary between Cameroon and Nigeria case*, ¶ 313.

91 It was the case, e.g., in *Territorial Dispute* (Libya v. Chad), Judgment, 1994 ICJ Rep. 6, *see*: Rosenne Sh., *supra* fn. 1, pp. 260–1.

92 *LaGrand*, ¶ 92.

the United States has not complied with the Order of 3 March 1999".[93] Surprising, the International Court of Justice decided to make such a determination despite the fact that neither the UN Charter nor the ICJ Statue equip it with a specific competence to declare instances of non-compliance in relation to interim measures. Notwithstanding, the *LaGrand case* is not the sole example of this practice of the World Court, as it declared non-compliance with provisional measures also in previous proceedings, including the *Fisheries Jurisdiction case*,[94] the *Nuclear Tests case*,[95] and the *Tehran Hostages case*.[96] Likewise, the World Court can play an active role in securing compliance with its provisional measures. Article 78 of the ICJ Rules stipulates that the Court may request information from the parties on any matter connected with the implementation of any provisional measures. It has utilised this power, e.g., in *Avena, Provisional Measures*.[97]

Still, the issue of a violation of the obligation to comply with a final judgment of the International Court of Justice may always be brought to the attention of the Court in new, subsequent proceedings, provided that the jurisdiction of the World Court is established. In such cases, the ICJ will examine the legality under international law of actions undertaken or inactions by a party to the initial proceedings in the post-adjudicative phase. As non-compliance is an internationally wrongful act under the UN Charter and the ICJ Statute as well as under customary international law, a proceeding before the ICJ would be rather straightforward.

Another interesting aspect of the role that the International Court of Justice plays in the post-adjudicative phase relates to compensation as a legal remedy in international dispute settlement. It is a common practice of the Court to order compensation, but to leave the determination of the exact amount for negotiations between the parties, while reserving for itself the right to determine the amount in case no agreement is reached. Thus, in the *Diallo case* the ICJ found:

> that the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations,
>
> and decided:
>
> that, failing agreement between the Parties on this matter within six months from the date of this Judgment, the question of compensation due to the Republic of Guinea shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.[98]

93 *LaGrand*, ¶ 115.

94 *Fisheries Jurisdiction* (UK v. Iceland), Judgment, Merits, 1974 ICJ Rep. 3, ¶ 33–4.

95 *Nuclear Tests* (Australia v. France), Judgment, 1974 ICJ Rep. 253 [*Nuclear Tests Case*], ¶ 19.

96 *United States Diplomatic and Consular Staff in Tehran* (USA v. Iran), Judgment, 1980 ICJ Rep. 3, ¶ 75 and 93 [*Tehran Hostages case*].

97 *Provisional Measures in Avena Case*, ¶ 59(I)(b).

98 *Diallo case*, ¶ 165(7) and (8).

As no such agreement was reached, the relevant sum of money to be paid to Guinea was determined in subsequent judgment.[99] This practice[100] provides some flexibility for the parties in the post-adjudicative phase to accommodate their conflicting interests and provide them with the possibility of choosing the most suitable modes of ending a dispute, parallelly narrowing its scope. At the same time, this method induces parties to comply with the judgment on merits, in which the breach of relevant international norms has been established.

Under international law, the admissible coercive measures extorting the compliance with international judicial decisions do not have to be initiated only by international organs or organisations as presented in previous paragraphs. Besides, this possibility is rather a novelty within the international system dating back to the era of the League of Nations. In fact, States have always been the best enforcers of international law and international decisions as they have access to resources lacked on the international plane. Coercive measures undertaken by a successful party are traditionally permissible[101] as "self-help" aimed at exerting pressure on a judgment-debtor and securing the satisfaction of a judgement of the ICJ. Customarily, acts of self-help, also known as countermeasures, may take the shape of retorsions or reprisals. Retorsions are unfriendly acts undertaken in response to the breach of international obligations of other States. These may include the closing of diplomatic missions, international trade restrictions, etc. Reprisals, on the other hand, are acts of an injured State that in their nature are contrary to international law but find justification in an antecedent violation of international law by a State against which they are directed. Modern international public law limits the scope of reprisals by pointing to proportionality as a guiding principle in choosing methods of addressing the violation of international law.[102] Furthermore, an injured State may not refer to the use of force or the threat to its use to induce enforcement (*guerre d'exécution*), as it is contrary to the UN Charter principles.[103] Nothing, however, precludes a judgment-creditor State from resorting to unilateral coercive measures, e.g., in the form of an assets freeze or attachments.[104]

99 *Ahmadou Sadio Diallo* (Guinea v. DRC), Compensation, Judgment, 2012 ICJ Rep. 324.

100 Similarly, the ICJ reserved the compensation determination for the subsequent proceedings, failing agreement between the parties, in the *Nicaragua case*, ¶ 292(15).

101 Schachter O., *supra* fn. 22, p. 6; Rosenne Sh., *supra* fn. 1, p. 225; Jenks C.W., *supra* fn. 22, p. 690; Magid P., *The Post-Adjudicative Phase. Presentation* [in:] *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, eds. Peck C., Lee R.S., Martinus Nijhoff Publishers 1996, p. 334.

102 *The Naulilaa case* (Portugal v. Germany), 31 July 1928, 2 UNRIAA 1011.

103 *Corfu Channel case*, p. 35; ARSIWA, Article 50(1)(a); Magid P., *The Post-Adjudicative Phase. Presentation* [in:] *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, eds. Peck C., Lee R.S., Martinus Nijhoff Publishers 1996, p. 334 rightly claiming that a *guerre d'exécution* is no longer justified by the fact of non-compliance.

104 Schachter O., *supra* fn. 22, pp. 7–8.

Along with the typical, unilateral actions of a judgment-creditor in the form of self-help, another possible venue for the enforcement of international judicial decisions requires the utilisation of domestic institutions and procedures provided for in national laws. It involves the engagement of the municipal judiciary.[105] Many reasons have been presented to support the role of national courts in implementing and enforcing international decisions. The two main reasons are, however, linked to the fact that international law is expanding over domains of social and political life, which it has never occupied before. Those areas, traditionally outside the scope of international law, are already regulated by domestic laws. Moreover, the undisputed progressive development within the international legal regime has led to the recognition of individual rights within this regime,[106] at least to some extent. It was even submitted that "[t]he enforcement of international law through national courts is the most commonly used method of international law enforcement and in many respects the most attractive".[107] Anyway, domestic judicial organs may support their international counterparts lacking real enforcement mechanisms and contribute to the effectiveness of decisions rendered on the international plane and strengthen the entire international legal regime. Such a possibility was already proposed in the 1960s by Schachter in his study on possible modes of enforcement of international judicial decisions.[108] Furthermore, ICJ decisions are currently becoming "inward looking", which implies and encourages municipal courts to "act as the natural enforcers of international decisions".[109] International rulings are frequently construed in such a way as to "address itself to the Judicial Branch"[110] of a State. The practice of States and the jurisprudence of domestic courts as a response to this address are presented and examined on the following pages.

2.2 Practice of ICJ decision enforcement in municipal courts

Neither the UN Charter nor the ICJ Statute regulate or even mention the enforcement of the World Court's decisions by municipal courts. But this does not automatically denote that they are prevented by international law from playing this

105 Guillaume G., *supra* fn. 38, p. 285: "appeal to national courts of law".

106 Sossai M., *Are Italian Courts Directly Bound to Give Effect to the Jurisdiction Immunities Judgment?*, 21 Italian YIL 175, 176 (2011).

107 O'Connell M.E., *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement*, Oxford University Press 2008, p. 329. Further, the author observes, "National courts are, in many respects, the most important institutions for enforcement of international law. Cherif Bassiouini calls national courts the 'indirect enforcement system' of international law", at *ibid.*, p. 328.

108 Schachter O., *supra* fn. 22, p. 12.

109 Fikfak V., *Domestic Courts Enforcement of Decisions and Opinions of the International Court of Justice. Paper No. 32/2014. Legal Studies Research Paper Series*, University of Cambridge, Faculty of Law, April 2014, p. 2, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430724 (2.03.2015).

110 *Medellin v. Texas*, 552 US 491, 563 (2008) (Breyer, Souter, & Ginsburg, diss.).

significant role. As already indicated, the provisions of the UN Charter governing enforcement by the UN Security Council are inadequate and do not prescribe to the Council the sole role in this regard. Furthermore, even the jurisprudence of the International Court of Justice reserves a certain role for domestic adjudicators in the post-adjudicative phase, as already described in Section 1.1.3.5. Similarly, the practice of municipal courts in regard to the enforcement of ICJ decisions is growing and warrants a detailed discussion.

But firstly, the useful classification of this practice requires an introduction. From the theoretical point of view, a typical instance of ICJ decision enforcement – hereinafter categorised as domestic enforcement *sensu stricto* – is when a State entitled under a judgment or other decision of the International Court of Justice acting as a legal person equipped with legal capacity initiates proceedings before a national court with the aim of utilising the national system of justice and the State coercive apparatus in order to give effect to the ICJ decision in question. A judgment-creditor State brings a judgment-debtor State or its organ to a municipal court and requests the concrete performance or non-performance indicated by the International Court of Justice in its decision. Obligatorily, the identities of parties to a case as well as the identity of the subject-matter of a dispute adjudicated firstly by the ICJ and later brought before a domestic court need to be present for enforcement *sensu stricto*. Then, it seems justified also to distinguish the enforcement *sensu largo* of ICJ decisions. This occurs when the identity of a State appearing before the International Court of Justice is altered on the national level. Its place is taken by a private party at domestic enforcement proceedings. Despite that, a functional relation between the State not participating in national proceedings and an individual or entity initiating a domestic judicial process exists. The other State appearing before the ICJ is, however, present also before municipal courts. The enforcement *sensu largo* occurs mainly in situations when diplomatic protection[111] has been exercised by a State. Still, the identity of subject-matter of both the international dispute before the ICJ and of a domestic case is necessary as in the case of enforcement *sensu stricto*.

Additionally, the practice of the *quasi*-enforcement of ICJ decisions by municipal courts is examined. This type occurs when a person – natural or legal – seeks judicial protection in a domestic court in relation to an international law breach declared so by the International Court of Justice on the basis of a factual background, which does not at all concern an individual initiating national proceedings. Nonetheless, his or her situation is identical or analogous to the one examined by

111 Diplomatic protection is one of the most basic institutions of international law constituting "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility", *see*: UN General Assembly, *Resolution 62/67. Diplomatic Protection*, 6 December 2007, UN Doc. A/RES/62/67, Annex, *Draft Articles on Diplomatic Protection*, Article 1. More on the diplomatic protection may be found at: Shaw M., *International Law*, 6th ed., Cambridge University Press 2008, p. 808n.

the ICJ. In such instances, there is neither the identity of parties nor of subject-matter on the international and national planes, but the legal situation of a person concerned is similar or parallel to private parties in the enforcement *sensu largo*.

Finally, the limited jurisprudence of national courts in relation to advisory opinions of the International Court of Justice is scrutinised. Due to structural differences between advisory and contentious proceedings, the term implementation is utilised to denote giving effect to advisory opinions of the ICJ in domestic courts.

2.2.1 ICJ decision enforcement sensu stricto

The enforcement *sensu stricto* of ICJ decisions with the use of municipal judicial systems is rather a rare phenomenon. This is due to the occurrence of a complex situation, both legally and diplomatically, once a judgment-creditor State initiates proceedings against a judgment-debtor State in a domestic judicial system. The ICJ decision enforcement *sensu stricto* assumes, as was already explained at the beginning of this chapter, the identity of parties and the subject-matter on both the international (before the ICJ) and national level, with some slight modifications possible. The only fundamental change that occurs is the transfer of a dispute from the international system of justice to the national judiciary of a particular jurisdiction. Thereby, a sovereign State which won a case before the principal judicial organ of the United Nations and holds a judicial decision confirming its claim or claims arising from the international law violation, surrenders itself to the judicial jurisdiction of its adversary from the ICJ proceedings. A State is primarily compelled to do so when, despite diplomatic efforts, a judgment-debtor is not willing or able to comply voluntarily with a ruling rendered. It is not a favourable situation for a State seeking redress in a municipal court as such a State might face a certain dose of animosity from the domestic justice system. Therefore, States are rather reluctant to employ this particular type of enforcement, and do so in order to preserve their most vital interests or indirectly the interests of their citizens.

Having this in mind, it is not surprising that only two national proceedings have been identified so far as examples of the enforcement *sensu stricto* of decisions of the International Court of Justice. It is rather difficult to recognise the two municipal judicial decisions rendered in these proceedings as representative or compelling for a few reasons. Both decisions were rendered in one and the same jurisdiction – within the federal system of justice of the United States – and before the same court – the US Supreme Court. Furthermore, the rulings in questions were issued without examining the merits of either case,[112] and the reasoning of the highest American court was very brief. The basis for both motions filed with the US Supreme Court were decisions on provisional measures ordering

112 In both described cases, the US Supreme Court denied a petition for a writ of *habeas corpus*, motions for leave to file a bill of complaint, a petition for *certiorari*, motion for preliminary injunction, and accompanying stay applications.

execution stays of individuals sentenced in the United States for grievous crimes, due to violations of VCCR, particularly provisions pertaining to the consular protection of persons being detained. Hence, they did not concern final judgments. Finally, both cases have attracted a significant amount of attention as they were preceded by long political negotiations and diplomatic interventions, but also touched upon controversial issues, like the death penalty and immigration, and pertained to brutal crimes.

The first attempt to enforce a decision of the International Court of Justice by a State within the framework of the judgment-debtor judicial system was associated with the *Breard case*, the first case of the Consular triad. In September 1992, Angel Francisco Breard – a Paraguayan citizen – was arrested in Arlington, Virginia, on suspicion of attempted rape and murder. During Breard's house search, the police found his Paraguayan passport directly indicating his foreign origins. The accused testified during the criminal process and confessed to all counts explaining that he was acting under a satanic curse. On 24 June 1993, the jury of the Circuit Court for Arlington County found him guilty and sentenced him to death. The Virginia Supreme Court upheld the verdict, and the execution date was set for 14 April 1998. Despite the knowledge of the Virginian authorities of the foreign citizenship of Breard, he had never been informed at any stage of proceedings about his right to consular protection. Moreover, the Paraguayan consular officers had similarly never been notified of Breard's arrest, detention, and criminal proceedings. Only in April 1996 did the Paraguayan consulate acquire information about his conviction and undertake certain steps through both diplomatic and legal channels in order to safeguard a fair trial. Unfortunately, all those efforts commenced at the state as well as federal levels[113] did not produce any results due to the procedural default doctrine. This legal principle prevents successful presenting of any federal law arguments in federal courts if they have not been raised in state proceedings. Therefore, the VCCR violation could not have been a successful ground for a writ of *habeas corpus* or any other relief as it had not been raised earlier.

Because of this impossibility of challenging national proceedings within the American legal system and in light of the fact that the execution was scheduled to take place in a few days, the Republic of Paraguay initiated proceedings before the International Court of Justice against the United States of America for violating Article 36 (1) (b) of VCCR by filing on 3 April 1998 an application with the Registry[114] on the basis of the VCCR *Optional Protocol*.[115] The application was additionally accompanied by a request for the indication of provisional measures in the form of a stay of Angel Francisco Breard's execution until the conclusion

113 *Paraguay v. Allen*, 949 F.Supp. 1269 (E.D. Va. 1996) and *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). The former case is particularly interesting as the US District Court discussed in its decision the problem of the standing of a foreign State in courts of another State.

114 *Application of the Republic of Paraguay*, 3 April 1998, http://www.icj-cij.org/docket/files/99/7183.pdf (17.12.2014).

115 *Optional Protocol Concerning the Compulsory Settlement of Disputes*, Vienna, 24 April 1963, 596 UNTS 497.

of the ICJ proceedings. Within six days, after the expedited oral proceedings, the International Court of Justice unanimously decided to indicate provisional measures in favour of Paraguay by obligating the United States to:

> take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.[116]

The basis of the order was the determination that if sentence were carried out by the respondent, the Court would be unable to adjudicate *restitution in integrum* sought by the applicant in relation to the criminal proceedings conducted against Breard and legally defective due to the violation of international law of consular protection by the USA as alleged by the applicant. Therefore, the ICJ concluded that provisional measures were required as the execution would "cause irreparable harm to the rights it [Paraguay] claims".[117]

Even before the initiation of the proceedings before the ICJ, the Republic of Paraguay petitioned the US Supreme Court to issue a writ of *certiorari*.[118] Breard himself did likewise. Supplementary motions were added after the order for the indication of provisional measures was rendered. Paraguay presented a motion for leave to file a bill of complaint to invoke the original jurisdiction of the Supreme Court, and Breard on his behalf filed a writ of *habeas corpus* together with a motion to stay the execution. On 14 April 1998, the day the execution of Breard was scheduled to be carried out, the US Supreme Court issued its opinion as a common decision for all motions filed. In *Breard v. Green*[119] the US Supreme Court denied *per curiam* all motions and Angelo Francisco Breard was executed by a lethal injection in Virginia on the same day.[120]

The main pivot of the arguments of the Republic of Paraguay and Breard focused on the Supremacy Clause of the US Constitution,[121] under which the US Constitution, statutes, and treaties are to be considered as "the supreme Law of the Land" having priority over any State laws. They argued that on this basis the procedural default doctrine should not exclude or limit the possibility of safeguarding individual rights under international law – such as the right to consular protection. Nevertheless, the Supreme Court did not share this argumentation and found it to be "plainly incorrect"[122] for two main reasons. First of all, it was stressed that

116 *Breard case*, ¶ 41(I).

117 *Ibid.*, ¶ 37.

118 The writ of *certiorari* is a special type of a judicial order within the common-law system that is issued by a higher court to the lower court for the latter to deliver the records of the case for a discretionary review. In the United States this institution is utilised by the US Supreme Court to choose cases for consideration at its discretion.

119 *Breard v. Green*, 523 US 371 (1998).

120 Stout D., *Clemency Denied, Paraguayan Is Executed*, 15 April 1998, New York Times, available at: http://www.nytimes.com/1998/04/15/us/clemency-denied-paraguayan-is-executed.html (6.08.2014).

121 Article VI (2).

122 *Breard v. Green*, at 371.

independently from treaty interpretations rendered by international tribunals, which should be given "respectful consideration", under international law the procedural principles of a forum State govern the implementation of international agreements in each State. Furthermore, the American legal system recognises a rule that any defect of criminal proceedings must be raised within the state judicial system in order to be considered on the federal *habeas corpus* review. Consequently, as any claim in relation to the right of consular protection under VCCR had not been presented before the Virginian courts, Breard failed to exercise his rights deriving from VCCR in accordance with the United States law as well as with the laws of the Commonwealth of Virginia. According to the US Supreme Court, due to this failure, Breard could not raise VCCR claims at the federal level.[123]

The second reason for rejecting the legal arguments of Paraguay and Breard was rooted in the status of international treaties within the American legal system. Pursuant to US constitutional law, both treaties and statutes of the US Congress enjoy the same position and in case of any conflict between them, the date of adoption or ratification is conclusive in accordance with the old and respected Latin principle *lex posterior derogat legi priori*. In 1996, the US Congress enacted the Antiterrorism and Effective Death Penalty Act, which limited the federal judicial review over detention of individuals . Such a review was allowed only under the condition that the factual basis of any such claim was sufficiently developed in State proceedings. As all claims relating to the violation of the Vienna Convention on Consular Relations were subject to limitations deriving from the subsequently enacted statute by the US Congress, Breard was not entitled to any relief concerning his conviction and sentence.

Arguendo, the US Supreme Court considered in *Breard v. Green* the situation which would have occurred if Breard had raised and proven his VCCR claims in State criminal proceedings and, therefore, himself opened the way to challenge his detention at the federal level. Nonetheless, the highest American court was of the opinion that it was "extremely doubtful"[124] that the mere violation of VCCR was sufficient to overturn the final judgment of the Virginian court without proving that it had some effect on the trial. "In this action, no such showing could even arguably be made" and all arguments of Breard were found to be speculative.

Further, two paragraphs of the opinion were dedicated by the US Supreme Court in their entirety to the discussion of the participation of the Republic of Paraguay in *Breard v. Green* proceedings. The Supreme Court found that neither the text nor the history of VCCR drafting and adoption offered any evidence for providing a foreign nation "a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions".[125]

123 The applicability of the procedural default rule to claims brought by individuals in relation to violations of VCCR was confirmed by the US Supreme Court in *Sanchez-Llamas v. Oregon*, 548 US 331 (2006).

124 *Breard v. Green*, at 377.

125 *Ibid.*

Moreover, according to the Supreme Court, the Eleventh Amendment[126] introduced into the American legal system the State immunity principle that limits the possibility of foreign countries suing any United State without its consent. Finally, the decision concentrated on the meaning of §1983 of the US Code governing the cause of action in federal courts. Under this section only "person within the jurisdiction" of the United States is entitled to seek relief for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws".[127] The Republic of Paraguay, in the Supreme Court's view, was not a person within the meaning of §1983, and further it was not within the jurisdiction of the United States. Consequently, Paraguay was not authorised to bring its claim. Similarly, also the Paraguayan Consul General in the USA was not authorised to present his case before the Supreme Court, as he was acting in his official capacity as a public officer and could not have enjoyed more rights than the State he represented.

The only reference to the proceedings before the International Court of Justice in the *Breard case* was made at the very end. The Supreme Court highlighted that the realm of foreign relations is vested with the executive branch of the US government and, therefore, it was the prerogative of that branch to stay the execution until the conclusion of the ICJ proceedings. Thus, it refrained from invading in any way into these prerogatives by stating that "nothing in our existing case law allows us to make that choice for him [the Governor of Virginia]".[128]

This first attempt to *sensu largo* enforce the decision of the ICJ through a domestic court is symptomatic. The US Supreme Court focused its argumentation exclusively on its own case-law and constitutional considerations without addressing the international obligations of the United States vis-à-vis the rendered order. It did not even consider addressing the issue of the status of the World Court's decisions within its own legal system and preferred to deny relevant motions on procedural grounds rather than reflect on the merits of the case. By doing so, the US Supreme Court indirectly refused to enforce the order for indication of provisional measures[129] issued by the International Court of Justice. *Breard v. Green* serves as an example in which the highest American court retreated from

126 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

127 42 U.S.C. § 1983.

128 *Breard v. Green*, at 378.

129 The ruling of the US Supreme Court faced sharp criticism, particularly at home. Richardson stated that: "[w]hen the Commonwealth of Virginia executed Angel Breard on April 14, 1998, the United States violated international law. The rule of law in the international community was affronted in several ways … The U.S. actions were the latest in a series of U.S. assertions of a pretended norm that American Exceptionalism is superior to international law, not lead in international human rights law", *see*: Richardson H.J., *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 Temple ICLJ 121 (1998). For Djajic "*Breard* ended up as a dispute between provincialism and globalization", *see*: Djajic S., *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 Hastings ICLR 27 (1999–2000), p. 99.

engaging in inter-judicial dialogue and preferred to leave complex, international legal matters for the Executive.

Similarly, the second instance of the enforcement *sensu largo* took place at the bar of the US Supreme Court. The Federal Republic of Germany unambiguously requested the enforcement of the order of the ICJ for the indication of provisional measures, which was explicitly noted by the Supreme Court in its opinion of 3 March 1999.[130] Although the motion of Germany was denied and the justification of this decision amounted to less than a page, nevertheless due to its sensational character and legal implications, the *LaGrand case* is examined in detail.

In 1982 two brothers of German nationality – Karl and Walter LaGrand – were arrested in the state of Arizona in connection with the robbery of the Valley National Bank in Marana, during which the bank manager was stabbed to death and another bank employee severely wounded. Subsequently, the jury of the Superior Court of Pitna County found both LaGrand brothers guilty of murder in the first degree, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping. Later, they were sentenced to death for murder and to concurrent terms of years for the other charges.[131] The Arizona Supreme Court affirmed the convictions and sentences[132] and the US Supreme Court denied the writ of *certiorari*. The LaGrand brothers were not informed by the Arizonian and federal authorities about their rights to consular protection at any stage of the proceedings, despite the fact that these authorities had full knowledge of the foreign citizenship of the arrested, accused, and later convicted. Not until the year 1992, when other inmates shared with the LaGrand brothers information about the possibility of notifying relevant officers of the State of their origin, did they contact the German Consulate, in result of which Germany through its agents became engaged in the case. Nevertheless, at the beginning of 1994, the date of Karl LaGrand's execution was set on 24 February the same year and that of Walter LaGrand on 3 March. Diplomatic measures and further judicial proceedings before federal courts as well as before pardon boards unfortunately did not produce any satisfactory results, and the first of the LaGrand brothers was executed as scheduled on 24 February 1999 by lethal injection.

On 2 March 1999 – one day before the scheduled execution of Walter LaGrand – the Federal Republic of Germany at 19:30 filed with the ICJ Registry an application initiating proceedings against the United States of America in relation to alleged violations of the Vienna Convention on Consular Relations, particularly the well-known Article 36(1). The jurisdictional basis for the application was, similarly as in the *Breard case*, the VCCR *Optional Protocol*. Along with the main application, the Federal Republic of Germany presented the International

130 *Federal Republic of Germany v. US*, 526 US 111 (1999): "Plaintiffs seek, among other relief, enforcement of an order issued this afternoon by the International Court of Justice, on its own motion and with no opportunity for the United States to respond, directing the United States to prevent Arizona's scheduled execution of Walter LaGrand".

131 *State v. LaGrand*, 152 Ariz. 483 (1987).

132 *Ibid.*

Court of Justice with a request for the indication of provisional measures, in which it asked the ICJ to determine that:

> [t]he United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings.

The next day, 3 March 1999, the Court unanimously decided *proprio motu* to indicate provisional measures in the form requested by Germany.[133]

Two hours before the execution of Walter LaGrand, the Federal Republic of Germany, on the basis of the order indicating the provisional measures issued by the International Court of Justice, petitioned the United States Supreme Court under its original jurisdiction for leave to file a bill of complaint and for a preliminary injunction against the United States of America and Jane Dee Hull, Governor of the state of Arizona, in the form of a stay of LaGrand's execution. Nonetheless, the US Supreme Court in the case *Federal Republic of Germany v. United States*[134] denied both motions. Consequently, the second brother was executed in a gas chamber. In its opinion rendered *per curiam* with only two dissents, the highest American court sketched four main bases for the denial of the German motions, nevertheless, without broad justifications. Firstly, the Supreme Court was of the opinion that nothing in the case indicated that the United States waived its sovereign immunity.[135] Another jurisdictional obstacle concerned Article II § 2 cl. 2 of the US Constitution regulating the original jurisdiction[136] of the US Supreme Court. It was not convinced that the mentioned provision may be invoked as "an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul".[137] Thirdly, in relation to the capacity of a foreign government to assert a claim against a state of the United States of America, the US Supreme Court could not find any evidence in VCCR to support such action. Moreover, the Eleventh Amendment of the US Constitution probably speaks against such a possibility. Fourthly and finally, the court declined to exercise its original jurisdiction due to the tardiness of the pleas as in its opinion the German

133 *LaGrand (Germany v. USA)*, Provisional Measures, Order of 3 March 1999, 1999 ICJ Rep. 9.

134 *Federal Republic of Germany v. US*, 526 US 111 (1999).

135 *Sovereign immunity* is a legal privilege granted to public authorities in the United States that prevents federal, state, and tribal governments together with local governments to some extent from being sued. Public authorities may only be sued if they consent to a litigation or waive their immunity. Such a waiver may also be general in form, as e.g., *Federal Tort Claims Act* (28 U.S.C. § 1346(b)).

136 Original jurisdiction is the power of courts to hear a case for the first time, the opposite of which is appellate jurisdiction. Although normally original jurisdiction is vested with trial courts, constitutional or statutory provisions may indicate that certain categories of matters shall be decided upon by the higher court as the first instance. In the United States, the US Supreme Court has the original jurisdiction in cases indicated in Article III Sec. 2 of the US Constitution, which include, e.g., disputes between States and between States and the federal government as well as those affecting ambassadors, ministers, and consuls.

137 *Federal Republic of Germany v. US*, at 112.

government could have filed the relevant actions earlier than two hours before the scheduled execution. It was reminded that the sentence was imposed on Walter LaGrand in 1984, the execution scheduled on 15 January 1999, and Germany learned about the proceedings against its citizen in 1992.

Although "[p]laintiffs seek, among other relief, enforcement of an order issued this afternoon by the International Court of Justice", the US Supreme Court's brief consideration of the case concentrated again merely and solely on domestic law without any analysis of international legal implications. It is striking that the highest court in the United States decided to pay much greater attention to the position of the Executive – the letter of the US Solicitor General on behalf of the United States[138] – rather than to engage in the inter-judicial dialogue of interpreting and analysing the Vienna Convention on Consular Relations and, therefore, agreeing with the International Court of Justice or presenting its own conclusions. This situation is remarkable particularly in light of the fact that the US Solicitor General's opinion was not thoroughly considered, as he had "not had time to read the materials thoroughly or to digest the contents".[139] Against this background the comparison of the position of the United States relating to the order on provisional measures in the *Tehran Hostages case* and the *LaGrand case* is striking. In the former dispute, in which the USA was an applicant, it insisted firmly and repeatedly that Iran should have complied with the order of the ICJ indicating provisional measures that were beneficial for the United States.[140] This stance was not maintained in circumstances not so favourable for the USA, and the binding force of the order of the World Court was even put in question.

2.2.2 ICJ decision enforcement sensu largo

The *sensu largo* enforcement of ICJ decisions is not a strict enforcement of a ruling as carried out in domestic legal systems. Due to the structure of international law, particularly the limitation of the jurisdiction *ratione personae* of international adjudication and the International Court of Justice[141] in particular, the alteration of the identities of the parties at the international and domestic level takes place. Thus, enforcement *sensu largo* assumes a specific correlative relationship between a State appearing at the bar of the World Court and a private party. This kind of enforcement takes place when the identity of the subject-matter of a dispute is maintained both on the international and domestic level. Additionally, the identity of one party from ICJ proceedings is similarly sustained with the municipal judicial system, either directly or through its organs or agents.

138 At least two Justices based their opinion exclusively on the position of the US Solicitor General, *see*: *Federal Republic of Germany v. US*, 526 US 111 (Souter & Ginsburg, concurring).

139 *Federal Republic of Germany v. US*, at 113.

140 Damrosch L., *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AJIL 697, 703 (October 1998).

141 Naturally, pursuant to Article 34(1) of the ICJ Statute, only States may be parties before the World Court and private parties are not admitted to appear or bring its case.

In this aspect, two distinct forms of the enforcement *sensu largo* shall be distinguished. The first type occurs when a violation of international law confirmed by the International Court of Justice has been associated with the breach of rights of private parties. Subsequently, these individuals or entities seek judicial redress before national courts invoking a particular decision of the World Court and requesting its enforcement together with proper compensation or restitution.[142] Furthermore, it is obvious that this type of enforcement is strongly connected with the concept of diplomatic protection as States in proceedings before the ICJ take up private claims and elevate them to an international dispute to be adjudicated upon in The Hague. Once the final judgment is rendered, a private party brings his or her case back to the municipal judicial system. Consequently, this first form of the enforcement *sensu largo* is the private enforcement of international law and international judicial decisions.[143] According to Nollkaemper, such a situation occurs when an individual is granted international primary rights. Private parties enjoy such rights "if a state party to a treaty has an international obligation to behave in a particular way, or to refrain from behaving in a particular way, toward that person".[144] When international law obligates States to respect determined rights of individuals, at the same time it provides these persons with correlative or primary rights, and consequently these rights may be invoked against a State obligated to respect them as a matter of international law.[145] Three dissenting Justices of the US Supreme Court referred to these claims as derivative claims:

> binding force does not disappear by virtue of the fact that Mexico, rather than Medellín himself, presented his claims to the ICJ. Mexico brought the *Avena* case in part in "the exercise of its right of diplomatic protection of its nationals" … Such derivative claims are a well-established feature of international law, and the United States has several times asserted them on behalf of its own citizens … They are treated in relevant respects as the claims of the represented individuals themselves … In particular, they can give rise to remedies, tailored to the individual, that bind the Nation against whom the claims are brought (here, the United States).[146]

142 The US Supreme Court expressed this relationship in *Medellin v. Texas*, 552 US 491 (2008), at 512: "Medellín argues that because the *Avena* case involves him, it is clear that he—and the 50 other Mexican nationals named in the Avena decision—should be regarded as parties to the Avena judgment. Brief for Petitioner 21–22. But cases before the ICJ are often precipitated by disputes involving particular persons or entities, disputes that a nation elects to take up as its own".

143 Nollkaemper A., *Internationally Wrongful Acts in Domestic Courts*, 101 AJIL 760, fn. 54 (2007).

144 *Ibid.*, at p. 768 and fn. 43.

145 Nollkaemper A., *National Courts and the International Rule of Law*, Oxford University Press 2011, p. 99. It is recognised that a relevant treaty provision does not have to explicitly provide for judicial redress in case of a violation in order for individuals to rely effectively on that treaty before national courts, *see*: *ibid.*, p. 103.

146 *Medellin v. Texas*, 552 US 491, 558–9 (2008) (Breyer, Souter, & Ginsburg, diss.).

In enforcement *sensu largo*, the legal basis for seizing any municipal court is the fact that "the underlying claims before an international tribunal are ultimately those of private parties who are being represented at the international level by their government".[147] This concept is strongly related to the notion of standing of private parties under international law, otherwise referred to as cause of action, invocability, and private right of action. International law does indeed, at least in certain fields with human rights being its most evident example, acknowledge the concept of standing of private parties. This standing is the entitlement of a person to rely on a rule of international law in municipal judicial proceedings as the basis for one's claim.[148] Furthermore, the law on State responsibility recognises that private parties may enforce their rights against a State in a situation when a particular State has committed a breach of an international obligation vis-à-vis these private parties and an internationally wrongful act has occurred. Article 33 of ARSIWA expressly stipulates:

> 1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
> 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State [underline added].

The second form of the enforcement *sensu largo* of ICJ decisions is the inversion of private enforcement. It is not a private party relying on a decision of the ICJ before municipal judicial organs against a State, but a State which prevailed before the World Court referring to it in proceedings initiated by private plaintiffs in national courts. Such a situation may be identified when a State is invoking an international law argument or defence elaborated in the decision of the World Court against a private party. This form of *sensu largo* enforcement occurs less frequently than private enforcement. Nevertheless, it is exemplified by national proceedings carried out in Italy as in the aftermath of the *Jurisdictional Immunities case*.

The phenomenon of the enforcement *sensu largo* of decisions of international courts has already been acknowledged by scholars. Bedjaoui, for example, clearly stressed that the understanding of the notion of enforcement shall not be strictly construed as in national proceedings, but rather shall encompass the broader concept as proposed by the present author. He explained,

147 Paust J.J., *Domestic Influence of the International Court of Justice*, 26 Denver JIL & Policy 787, 791 (1997–8).

148 Nollkaemper A., *supra* fn. 145, p. 92.

> [t]he *enforcement* of an international judicial decision should be taken to mean either the situation where judicial proceedings are instituted before a national court by the successful state claiming enforcement against the unsuccessful state, or that where a third party-whether a private individual or a public corporation-directly concerned by that decision seeks the benefit of it in a national court.[149]

Notwithstanding, no systematic discussion of the matter has been presented so far.

Socobel v. Greek State[150] is widely considered in the international scholarship as the first and the most prominent attempt to enforce a ruling of the permanent international tribunal.[151] Actually, it is not a typical example of international decision enforcement in the strict sense of the term. It should be rather categorised as enforcement *sensu largo*, where private parties keenly interested in the ruling of the international tribunal sought to utilise municipal judicial organs to protect their private interests. On 15 June 1939, the Permanent Court of International Justice delivered its judgment in the *Société Commerciale de Belgique case*,[152] in which it concluded that an arbitral award of 1936 issued in a dispute between Greece and a Belgian company Société Commerciale de Belgique (Socobel) was "definitive and obligatory".[153] Under the award, the Greek government was obliged to pay the abovementioned company the sum of $6,771,868 with interest. Nevertheless, the payment was never made and the Socobel company managed to obtain garnishee orders against debts owned by the Greek State in Belgium. Greece complained to the Civil Tribunal of Brussels requesting the orders be set aside on the basis of the jurisdictional immunities to which the Greek government was entitled, and of the fact that an *exequatur* to the arbitral award was not issued in Belgium and, therefore, it might not produce any legal effects in the Belgian legal order. The company argued on the contrary that the award was confirmed by the judgment of the PCIJ, which was binding in Belgium without any further obligation of obtaining a judgment executory.

The Civil Tribunal of Brussels did not share the Greek government's argument that it was supposedly entitled to judicial immunities in relation to commercial activities undertaken on the territory of Belgium. Notwithstanding, the Tribunal rejected the company's line of argumentation in relation to the effect of PCIJ decisions in municipal legal systems:

149 Bedjaoui M., *The Reception by National Courts of Decisions of International Tribunals*, 28 NYUJILP 45, 47 (1996–6).

150 *Socobel v. Greek State*, Civil Tribunal of Brussels, 30 April 1951, 18 ILR 3 (1951) [*Socobel case*].

151 O'Connell M.E., *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment against the United States*, 30 Virginia JIL 891, 914 (1989–90).

152 *Société Commerciale de Belgique* (Belgium v. Greece), Judgment, 1939 PCIJ Ser. A/B 78.

153 *Ibid.*, p. 22.

> [t]he plaintiff Company claims that it cannot be conceived that a decision emanating from that International Court, which decides disputes between States, should require the exequatur of Belgian tribunals. *De lege ferenda* such an exemption from exequatur seems conceivable or even legitimate. However, at the present time, no international arrangement has introduced such a principle into the Belgian legal system. The plaintiff Company claims that the Permanent Court is not a "foreign tribunal" but a "superior tribunal", common to all States which have accepted its Statute, and that as such its decisions do not require exequatur. However, in the absence of an independent power of execution belonging to that Court, which would enable litigants before it to execute its decisions *de plano*, these decisions are not exempt from the servitude imposed on Belgian territory on decisions of other than Belgian tribunals.[154]

The second issue discussed by the Tribunal in its opinion was the relation between an international decision rendered in a dispute between two sovereign States and the entitlements of private parties deriving from such a decision. According to the Brussels court, it could not have been recognised that the *Société Commerciale de Belgique case* judgment issued between Greece and Belgium was a judgment in favour of a private company. It was "inconceivable" to allow a party which was not entitled "by definition" to appear before the PCIJ to rely on a decision issued by this Court in proceedings to which it could not have been a party. Consequently, although the Civil Tribunal decided that the garnishee orders were valid, no payment could be ordered before the obtainment of *exequatur*.

Although the *Socobel case* was an attempt to enforce the ruling of the first permanent international tribunal – the Permanent Court of International Justice – not the International Court of Justice, its short analysis is justified. Both tribunals share a common heritage, tradition, legal framework, and institutional continuity.[155] Moreover, the Belgian case is widely discussed in international law scholarship and, therefore, should be presented at the beginning of a discussion of the enforcement of ICJ decisions by private parties. Finally, the *Socobel case* was symptomatic for the *sensu largo* enforcement and municipal court's attitude towards international tribunals' rulings for several decades until the next decision issued on the other side of Atlantic. Nevertheless, its significance in the analysis of the enforcement of international courts' decisions is limited.[156] The PCIJ in its judgment only acknowledged and upheld the finality and binding force of an arbitral award. Such a pronouncement did not change the character of a commercial arbitral decision that requires an *exequatur* issued in accordance with domestic law in order to be enforced in that national jurisdiction. Consequently, the *Socobel*

154 *Socobel case*, at 4.
155 *See*: Article 92 of the UN Charter, Articles 36(5) and 37 of the ICJ Statute.
156 Gattini A., *supra* fn. 22, p. 1173.

case is not of itself a direct example of the enforcement of a decision of the permanent international tribunal.

From 1951, for many years there were no identified attempts at enforcement *sensu largo*. It was not until 1998, more than 45 years later, that one of the most substantial judicial decisions in this matter was rendered. *Committee of United States Citizens Living in Nicaragua v. Reagan*[157] heard by the United States Court of Appeals for the District of Columbia Circuit was in fact an indication or indicator of municipal courts' attitude towards the *sensu largo* enforcement of ICJ decisions for decades to come. On 27 June 1986, the International Court of Justice rendered one of its most important and controversial judgments in the *Nicaragua case*. The ICJ decided that:

> the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.[158]

The World Court additionally determined that the United States was under an obligation to pay reparations to Nicaragua for all injuries caused by the American violation of international law and that the respondent was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations".[159] On a different note, it is worth mentioning that the United States refused to appear before the ICJ and participate in the merits phase of the proceedings after the jurisdiction and admissibility ruling, claiming that the Court was not competent to hear the case.

In relation to the final decision of the ICJ in the *Nicaragua case*, different organisations associating American citizens discontented with US policy in Central America and suffering damage due to the armed conflict in Nicaragua backed by the United States filed suit with the federal US District Court for the District of Columbia. They requested a declaratory relief that funding of the *Contras* forces in Nicaragua was contrary to federal law, the UN Charter, and customary international law and requested judicial ceasing of this financing by the US Congress. The district court dismissed the entire complaint as concerning non-justiciable political questions. The US Courts of Appeals found the grounds of the district court's dismissal as misplaced, "particularly to the extent that appellants seek to vindicate personal rights rather than to conform America's foreign policy to international legal norms".[160] In the opinion of the appellate court that

157 *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir, 1998) [*Committee v. Regan*].

158 *Nicaragua case*, ¶ 292(3).

159 *Ibid.*, ¶ 292(12).

160 *Committee v. Reagan*, at 932.

particular case was as such justiciable in American federal courts, nevertheless it warranted dismissal.

The complaint dismissal should be based on more fundamental premises than on the blanket reference to the doctrine of political question. The US Courts of Appeals was of the opinion that:

> [n]either individuals nor organizations have a cause of action in an American court to enforce ICJ judgments. The ICJ is a creation of national governments, working through the U.N.; its decisions operate between and among such governments and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated—in this case, a claim brought by the government of Nicaragua. Appellants try to sidestep this difficulty by alleging that our government has violated international law rather than styling their suit as an enforcement action in support of the ICJ judgment. The United States' contravention of an ICJ judgment may well violate principles of international law. But … those violations are no more subject to challenge by private parties in this court than is the underlying contravention of the ICJ judgment.[161]

Appellants argued that non-compliance with the decision of the International Court of Justice coupled with the continuance of the *Contras* financing constituted a violation of international law. The breach occurred firstly in relation to Article 94 of the UN Charter and, subsequently, to general principles of international law, particularly the *pacta sunt servanda* principle, and finally *jus cogens* norms. The US Court of Appeals, considering these allegations, highlighted that the most fundamental legal issue underlying the case was not whether the United States had breached any category of international law norms, but rather whether any such breach had any consequences in the municipal legal regime. In the court's opinion, in a situation when two departments of the government – the Legislative (the US Congress) and the Executive (the US President) – cooperatively violated international law by agreeing to finance the *Contras*, the American courts were not competent to remedy such a violation of the treaty law or a customary rule. This results first and foremost from the legal status of treaties that in accordance with the American constitutional law enjoy the same position as legal statutes adopted by the US Congress. A legal consequence of this status is the fact that in case of a conflict between a ratified-treaty norm and a statutory provision, the priority shall be attributed to the legal act that was adopted or ratified subsequently pursuant to the *lex posterior derogate legi priori* rule. Thus, as the congressional consent to the financing of insurgents was issued later than the entrance into force of the Charter of the United Nations in relation to the United States, a claim concerning the violation of this Charter could not be accepted. The matter of the breach of

161 *Ibid.*, at 934.

the international customary law by the subsequent legislative actions should be assessed analogously.

The federal court nevertheless emphasised that the presented argumentation obviously did not refer to the responsibility of the United States of America on the international plane but applied only to the domestic legal system. By citing the US Supreme Court *dictum* in the *Head Money cases*,[162] the US Court of Appeals agreed that the enforcement of treaty provisions depends on

> the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations … [but] with all this the judicial courts have nothing to do and can give no redress.[163]

Additionally, the US Court of Appeals stressed that even if assumed *arguendo* that Article 94 of the UN Charter had been violated by congressional actions, nonetheless the appellants did not possess the private right of action under this provision. As only States are entitled to appear as parties before the International Court of Justice, the appellants being private individuals should not be understood as "parties" within the meaning of this article. The court concluded that the purpose of Article 94 of the UN Charter is not to equip private parties with a right to enforce decisions of the ICJ against its own government as it stated that "this clause does not contemplate that individuals having no relationship to the ICJ case should enjoy a private right to enforce the ICJ's decision".[164] But the reasoning of the American court also suggested that in situations when such a link does exist, individuals may have standing before municipal courts to enforce international decisions.

The most interesting part of the argument of the appellants related to the international peremptory norms and the consequences of their breach within the American legal system. They claimed that the international rule requiring the parties presenting their dispute for resolution by an international tribunal to respect and comply with a final ruling of such a tribunal was not only rooted in customary law, but moreover had obtained the *jus cogens* character. They argued that such norms are non-derogable and enjoy the highest force of binding within international law and, consequently, are also binding upon governments within the domestic legal framework. They went even further by maintaining that "the obligation stemming from the ICJ judgment … is such that it rises to the level of a constitutional obligation, which cannot be overridden by statute".[165] The US Court of Appeals did not share this position. It pointed out that no legal authority – statutory or judicial – backed up such contentions. Secondly, after the scrutiny of

162 *Head Money cases*, 112 US 580 (1884).
163 *Ibid.*, at 598.
164 *Committee v. Reagan*, at 938.
165 *Committee v. Reagan*, at 940.

Article 53 VCLT, the court preferred rather to concentrate on the ICJ judgment in the *Nicaragua case*, as it concluded that the international community did not consider the decision as the peremptory obligation.[166]

The negative outcome of the case in *Committee v. Reagan* for the applicants might be generalised as the negative attitude of the American courts towards the International Court of Justice. As the following examples from the jurisprudence of different types of US courts illustrate, such a generalisation is not warranted, although the US Supreme Court in particular tends to follow the policy of the government of the United States in this regard.[167] Nevertheless, there is also an easy justification for the dismissal in *Committee v. Reagan*. Plaintiffs' claims did not in fact have any functional relation with the claims of any party to the *Nicaragua case* adjudicated by the International Court of Justice as no diplomatic protection was exercised or could have been exercised. In this context, it is even arguable whether *Committee v. Reagan* should be discussed and presented as an example of the enforcement of ICJ decisions. It is discussed here as most representatives of academia acknowledge it as an instance of enforcement of an ICJ decision. Notwithstanding, similar problems do not arise in relation to the following attempts.

*2.2.2.1 Post-*Avena *enforcement* sensu largo

The issue of the enforcement of ICJ decisions by private parties within the American internal legal regime returned twice as strong in 2004, when the International Court of Justice rendered the judgment against the United States of America but in favour of Mexico in the *Avena case*. It was the last case in the Consular triad, in which the systematic violation of Article 36 VCCR by the US was alleged in relation to foreign nationals arrested, detained, and subsequently convicted. The Court established that Mexican nationals were not informed by the relevant authorities of their right to consular protection and parallelly the consular offices of their countries of origin were not notified about their arrest. Eventually, the ICJ decided that *inter alia* by not informing without delay the 51 citizens of Mexico specified in the judgment by name of their right under Article 36 (1) (b) VCCR the United States of America violated their international obligations. In relation to the 49 convicted Mexicans, the ICJ found the breach of the same provision in the form of lack of notification of the appropriate Mexican consular post without delay about their detention. Adequate reparation in the World Court's almost unanimously opinion

166 *Ibid.*, at 935 and 942.

167 Murphy S.D., *United States and the International Court of Justice: Coping with Antinomies* [in:] *The Sword and the Scales. The United States and International Courts and Tribunals*, ed. Romano C., Cambridge University Press 2009.

> consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals … by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment.[168]

The *Avena* judgment ordered the examination of criminal proceedings concluded with final and binding guilty verdicts and sentences as judicial relief for violations of international law of consular assistance. Consequently, it is not surprising that many of Mexican nationals indicated by name in the ICJ ruling sought the enforcement of the *Avena* judgment before American courts.

The first significant aftermath within the American domestic legal system of the ICJ determinations in *Avena* was the case of Ruben Ramirez Cardenas that finally reached the US Court of Appeals for the Fifth Circuit upon his appeal in relation to a federal *habeas corpus* petition denial.[169] He was one of the individuals expressly mentioned in the ICJ judgment.[170] The defendant was found guilty of the murder of Mayra Laguna and sentenced to death. After his initial arrest, Cardenas gave a statement to police officers admitting to killing the victim and even showed the scenes where he raped her and disposed of her body. Although a Mexican national, he was not informed about his VCCR rights to consular assistance. Thus, he claimed in his federal proceedings *inter alia* that he was indeed prejudiced during his trial because he would have not confessed and provided inculpatory statements had he the assistance of the Mexican consular officers. The US Court of Appeals affirmed the district court's denial of *habeas* relief. Despite the explicit holding of the ICJ in *Avena*, the federal court determined that Cardenas' Vienna Convention claim had been procedurally defaulted on the basis of the US Supreme Court's *dictum* in *Breard v. Green*. Moreover, in its opinion, the petition could not have succeeded, as VCCR does not confer individually enforceable rights. Despite these two conclusions, the court proceeded in its opinion also to discuss concisely the merits of the right to consular assistance claim:

168 *Avena*, ¶ 153(9).

169 *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005) [*Cardenas case*]. A first identified case being an example of the enforcement *sensu largo* was *Plata v. Dretke*, 111 Fed.Appx 123 (5th Cir. 2004). Nevertheless, it is not discussed here at length as it was rendered on 16 August 2004, only three months after the *Avena* judgment, and the defendant, who was mentioned directly in the judgment, did not have the possibility of supporting his writ of *habeas corpus* with the World Court's decision. The US Court of Appeals for the Fifth Circuit did mention the *Avena case* in its decision, and it seems that it also followed its guidance in relation to the mandated "review and reconsideration" (but probably not in relation to the procedural default doctrine application); nevertheless the outcome was negative for Plata. The court found in that case that he had not suffered prejudice at his trial due to the lack of consular assistance as all arguments raised by the defendant were merely speculative.

170 *Avena case*, ¶ 16(41).

> it is not disputed that Cardenas: (1) was given his *Miranda* warnings; (2) was advised of his right to legal representation before he confessed to killing Mayra Laguna; (3) voluntarily waived his right to advisement by an attorney; and (4) was provided with legal representation upon his request. The ICJ also determined that the Mexican consular authorities learned of Cardenas' detention in time to provide him assistance, but decided not to assist him with his legal representation. Cardenas thus fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest.[171]

It is rather difficult to recognise the *Cardenas case* as a typical example of the compliance by judicial organs with ICJ decisions and enforcement *sensu largo* as the US Court of Appeals rejected ICJ conclusions relating to the procedural default rule. Despite that, it may still be argued that the judicial analysis carried out by the Fifth Circuit was exactly the review and reconsideration, although with some inconsistencies, that the International Court of Justice ordered, but its results were negative for the petitioner. The factual determinations of the unwillingness of the Mexican consulate to assist Cardenas accused of a brutal crime only support this conclusion.

Next, Osbaldo Torres or Osvaldo Natzahualcoyotl Torres Aguilera was indicated by the International Court of Justice as number 53 on the list of Mexican nationals detained and convicted in the United States with the violation of their rights to consular assistance.[172] He was found guilty and sentenced to death twice by the Oklahoma County District Court for two counts of first-degree murder and other charges. Although the Oklahoma Court of Criminal Appeals affirmed the conviction, Torres initiated relevant judicial proceedings four times in order to have his conviction set aside – twice before courts of the state of Oklahoma and twice before federal courts. All these efforts proved to be unsuccessful. Eventually, after the ICJ rendered the *Avena* decision, he filed with the Oklahoma Court of Criminal Appeals[173] an application for post-conviction relief in April 2004 raising that he was not informed of his right to consular assistance during his detention and trial.

Considering Torres' application, the Court of Criminal Appeals in the first place had to set the formula which would assist it in deciding whether the defendant was prejudiced in his criminal trial due to the violation of his rights under the Vienna Convention on Consular Relations. Consequently, the court established a three-prong test that required determination on: (1) whether a defendant had some knowledge of his right to consular protection; (2) whether he or she would have benefited from this right had he or she known of it; (3) whether it was probable

171 *Cardenas case*, at 253–4.

172 *Avena case*, ¶ 16.

173 The Oklahoma Court of Criminal Appeals is the highest court of the criminal jurisdiction in the state of Oklahoma.

that the consular post would have provided its assistance to a defendant.[174] If the answer for each of these three questions is affirmative, the legal assumption is created that the defendant suffered prejudice during trial. Interestingly, it is not required under this formula to prove that the engagement of the consular service of a defendant's country of origin would impact the outcome of the criminal case.

> The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government. Even if that assistance cannot, ultimately, affect the outcome of the proceedings, it is a right and privilege of national citizenship and international law. The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has the opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens … This test for prejudice from a violation of Vienna Convention rights is consistent with the direction of the International Court of Justice decision, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [*Avena*]. *Avena* noted that the remedy directed in that case, the judicial review we here undertake, should be done "with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." The phrase "actual prejudice" can refer only to prejudice flowing from the violation of the purpose of the Convention provision. That purpose is to ensure that a foreign citizen has the opportunity for aid from his or her government in an unfamiliar criminal jurisdiction. Whether or not the aid results in a different case outcome, a citizen must be actually prejudiced when he is denied aid his government would have provided.[175]

Taking into account all evidence presented during the evidentiary hearing scheduled on the basis of Torres' application for post-conviction relief or submitted otherwise, the Oklahoman court concluded that the defendant was actually prejudiced only in the sentence phase of his trial, not the guilt-determination part. He admittedly demonstrated that the engagement of the Mexican consular authorities in the last part of his trial, after they were tardily notified about Torres' arrest by an independent source, was significant. Independent investigators, gang experts, and a neuropsychiatrist were hired to assist the Court of Criminal Appeals in the case determination. Nonetheless, all these efforts concentrated on mitigating the possibility of a capital punishment being imposed on the defendant rather than, in the opinion of the court, assisting in proving his innocence. Therefore, the

174 *Torres v. State of Oklahoma*, 120 P.3d 1184 (Court of Criminal Appeals of Oklahoma 2005), at 1186.

175 *Ibid.*, at 1187–8.

evidence would have affirmed that Torres would only have suffered actual prejudice in his trial, if he was still facing the death penalty. However, in this particular case the Governor of the State of Oklahoma used his prerogatives and granted Torres clemency by commuting his death sentences to life imprisonment without the possibility of parole. Actions of the executive redressed the prejudice suffered by Torres. As he has already received relief from his sentence, no further judicial relief was possible as "all issues relating to Torres's sentences of death are thus rendered moot".[176]

The *Torres case* "signified compliance with an order from the ICJ – placing the ICJ and international treaty rights over domestic procedural practice".[177] Furthermore, this case is also significant in American judicial practice as the first instance of implementing an international judicial decision by the judiciary, at least at the state level, in the absence of any additional legislative measures.[178] The Oklahoma Court of Criminal Appeals decided to explicitly indicate in its ruling that it undertook the judicial review ordered by the International Court of Justice and thus complied with the ICJ decision. Although the outcome of this review did not affect the situation of Torres, the enforcement of the judgment of the International Court of Justice envisaging a procedural remedy was ensured.

A less ambiguous indication of respecting the determinations of the World Court in relation to the US violation of the right to consular protection of a Mexican national named in the *Avena* judgment[179] came from the US District Court for the Western District of Texas in *Leal v. Quarterman*.[180] Again, the second federal *habeas corpus* action filed by Leal was a clear attempt to enforce *sensu largo* the ICJ judgment as the petitioner argued both in state and subsequent federal courts that "he was entitled to relief from his capital murder conviction and sentence of death by virtue of the determination on March 31, 2004 by the International Court of Justice at The Hague".[181] The court dismissed without prejudice Leal's petition as not conforming with procedural requirements for a second or successive *habeas corpus* application.[182] Alternatively, the petition was denied on merits as

> [t]his Court reaches this alternative conclusion because, after a searching inquiry, this Court concludes that even if petitioner is given the type of

176 *Ibid.*, at 1186.

177 Finstuen H.L., *From the World Court to Oklahoma Court: The Significance of Torres v. State for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes*, 58 Oklahoma LR 255 (2005), p. 257.

178 Ku J.G., *International Delegations and the New World Court Order*, 81 Washington LR 1, 50 (2006).

179 Humberto Leal Garcia is listed in the judgment under number 36: *Avena*, ¶ 16(36).

180 *Leal v. Quarterman*, --- F.Supp.2d --- (W.D.Tex. 2007), 2007 WL 4521519 [*Leal case*].

181 *Ibid.*, at 3.

182 Under 28 U.S.C. § 2244(b)(3), a petitioner filing a second or successive federal *habeas corpus* application in the district court must first obtain a relevant authorising order from a competent federal court of appeals. Leal's first petition was presented in 2000 and he did not request the Court of Appeals for the Fifth Circuit to obtain the relevant order.

> "review and reconsideration" mandated by the ICJ's decision in petitioner's case, petitioner did not sustain "actual prejudice" as a result of the post-arrest violation of petitioner's Vienna Convention rights.[183]

Such a determination, although not positive for the defendant, nevertheless illustrates the willingness and sense of obligation on the side of a municipal court to look into the decision of the ICJ and comply with it. Consequently, the reasoning of the federal district court in this regard requires careful examination.

Firstly, the court highlighted the significant distinction between the *Leal case* and other proceedings concentrating on the VCCR violations. Leal together with his brother, at the date of victim's body discovery, voluntarily followed police officers to the station and gave statements about their knowledge of circumstances surrounding Adria Sauceda's murder. They left and returned home undisturbed. Leal was placed in detention only after the arrest warrant was obtained. Additionally, the enforcement officers collected forensic evidence independently[184] that spoke overwhelmingly to the petitioner's guilt. Thus, this was not a case in which a citizen of a foreign country was arrested and after this arrest, during custodial or subsequent interrogation, confessed.

> Nothing in either the Vienna Convention or the ICJ's opinion in *Avena* compels local, state, or federal law enforcement authorities in this nation to contact the consulate of a foreign national before those same law enforcement authorities seek to question a foreign national during the investigation of a criminal offense. Petitioner and his brother Gualberto each gave voluntary statements to the police and returned to their home. Neither of these young men were under arrest when police questioned them hours after the discovery of Adria Sauceda's body. Thus, the Vienna Convention had no application during the interviews which resulted in both brothers giving statements to the police concerning what they claimed to know about Adria's murder. Nor did the Vienna Convention have any application to the police investigation which resulted in the collection of physical evidence linking the petitioner to Adria's murder.
>
> Even if the assistance of the Mexican government would have enabled petitioner to present the same factual and expert testimony at trial which petitioner subsequently presented during his first state habeas corpus proceeding, there is not even a remote possibility the outcome at the guilt-innocence phase of petitioner's capital murder trial would have been different. The prosecution's case at the guilt-innocence phase of trial was supported by

183 *Leal case*, at 1.

184 This includes the autopsy results that proved that the victim was sexually assaulted with a stick, traces of blood in and on Leal's vehicle, bite-marks on the victim's body, the victim's blood-stained blouse located in Leal's residence, and the presence of blood on the defendant's underwear possibly belonging to the victim.

> overwhelming evidence, the most damning of which came from the mouth of petitioner's own brother, Gualberto. Petitioner's own written statements to police, which petitioner wrote by hand and executed *prior* to any violation of petitioner's Article 36 rights, further tied petitioner to the brutal murder of Adria Sauceda.[185]

The actual violation of Leal's rights under Article 36 VCCR arising from the failure of local enforcement officers to notify the Mexican consular post about his arrest could not have possibly had any legal or factual influence on his inculpatory statements that were made before his detention. No additional incriminating evidence was collected due to this breach of VCCR. Moreover, the following violation of his treaty rights did not warrant the exclusion of statements given before the occurrence of the violation. Consequently, the US District Court concluded that Leal did not suffer "actual prejudice" as defined by the ICJ in the *Avena* judgment.

The *Leal case* may be acknowledged as a classic model of judicial branch compliance with ICJ decisions in the process initiated by private parties to enforce *sensu largo* those decisions. It seems that the US District Court similarly understood its approach as it expressly acknowledged that

> [t]his Court had independently exercised precisely the type of "review and reconsideration" mandated by the ICJ in *Avena.* In so doing, this Court disregarded any potential application of state procedural default rules and assumed the ICJ's judgment in *Avena* possessed the same legal authority as a decision of the United States Supreme Court.[186]

This straight-forward approach, resembling the hierarchical structure of the municipal judiciary and drawing analogies between national and international systems of justice, might be actually too far-reaching and, therefore, face criticism, particularly on the side of higher national courts, as the next case illustrates. Notwithstanding, the *Leal case* without doubt is a decent example of the enforcement of ICJ decisions and willingness to engage actively in a fruitful inter-judicial dialogue between the International Court of Justice and domestic courts. This, however, does not imply that the outcome of this dialogue would be beneficial for a person initiating enforcement *sensu largo* in domestic judiciary.[187] Nevertheless, the next case, exceptionally controversial, may be categorised as a manifest example of almost explicit defiance on the part of the municipal judiciary.

185 *Leal case*, at 21.

186 *Ibid.*, at 24.

187 The *Leal case* was not the end of Humberto Leal Garcia's judicial battle within the state and federal system of the United States as many proceedings were initiated and decisions rendered subsequently. It also reached the US Supreme Court – *Leal Garcia v. Texas*, 564 US 940 (2011).

José Ernesto Medellin, a Mexican national, was found guilty by a jury in September 1994 and subsequently sentenced to death for the gang rape and successive brutal murders of two Texan teenagers. As he was not informed about his Article 36 VCCR rights upon his arrest, his case was brought before the International Court of Justice by Mexico that held in the *Avena case* that the United States violated international law by not complying with VCCR in relation to Medellin.[188] After unsuccessful state *habeas corpus* proceedings, the defendant petitioned the US Supreme Court for a writ of *certiorari* that was granted to decide specific questions. The first was whether the ICJ's judgment in *Avena* has an automatic domestic legal effect and is directly enforceable as domestic law in a state and federal court in the United States. The second concerned the issue of the US President's Memorandum[189] and its legal effect within the American legal system, as it independently required the states to provide review and reconsideration of claims of the 51 Mexican nationals indicated in the judgment of the *Avena case*. The relevant decision of the US Supreme Court was rendered on 25 March 2008 in *Medellin v. Texas*.[190]

The judgment of the Texas Court of Criminal Appeals was affirmed as the highest American court answered in negative the first legal question, declaring that "while the ICJ's judgment in *Avena* creates an international obligation on the part of the United States, it does not of its own force constitute binding federal law"[191] pre-empting state law. By reaching this conclusion, the court analysed three international agreements underlying the ICJ decision. The Optional Protocol,[192] in the opinion of the Justices, only submits disputes arising from VCCR to the jurisdiction of the International Court of Justice but is silent on the legal effect of the World Court's judgments. This effect is governed by Article 94 of the UN Charter that uses, according to the US Supreme Court, the unfortunate and ill-considered phrase that each UN member "undertakes to comply" with ICJ decisions. This phrase, according to the majority opinion, does not provide that these rulings are binding and have immediate legal effect, but rather expresses a commitment to take further action to comply. Furthermore, the lack of direct enforceability is reinforced by the second paragraph of Article 94 of the UN Charter, pursuant to which, as per the US Supreme Court interpretation,

188 He was listed in the 38th position in the *Avena* judgment, *Avena case*, ¶ 16(38).

189 United States President, *Memorandum for the Attorney General from the President of the United States of America on Compliance with the Decision of the International Court of Justice in Avena*, 28 February 2005, available at: http://www.refworld.org/docid/429c2fd94.html (15.01.2015) [*President's Memorandum*].

190 *Medellin v. Texas*, 552 US 491 (2008) [*Medellin case*]. Medellin's case was brought once more to the bench of the US Supreme Court in 2008, but all his motions were denied in *per curiam* decisions; *see*: *Medellin v. Texas*, 554 US 759 (2008).

191 *Medellin case*, at 522–3. In the opinion of the US Supreme Court, if treaties underlying a judgment are self-executing, then the judgment itself is directly enforceable as domestic law in American courts.

192 *Optional Protocol Concerning the Compulsory Settlement of Disputes*, Vienna, 24 April 1963, 596 UNTS 497.

"the sole remedy for noncompliance"[193] is a referral to the UN Security Council. As discussed previously in Section 2.1.4, this conclusion does not stand up to scrutiny. Finally, the court referred to Article 59 of the ICJ Statute[194] defining the binding force of ICJ decisions and limiting it only to parties to a particular case. As only States may be parties to ICJ proceedings, the *Avena* judgment is not binding in relation to Medellin, an individual. Since neither the UN Charter, nor the ICJ Statute nor the Optional Protocol are self-executing treaties that form part of federal law; consequently also ICJ decisions are not domestic law, according to the Supreme Court.

Unfortunately, the *Medellin case* also presented the highest American court's specific view on international law and the international obligations of the United States[195] constituting rather a part of international affairs better dealt with by the "political departments" of the American government[196] then through courts of law. This is further highlighted by the principle adopted by the US Supreme Court that "the United States' interpretation of a treaty 'is entitled to great weight'",[197] even though in this particular case the United States submitted its brief as *amicus curiae* in support of the petitioner.[198] Strikingly, the majority opinion focused on the interpretation of international instruments (whether this interpretation is

193 *Medellin case*, at 509.

194 "The decision of the Court has no binding force except between the parties and in respect of that particular case".

195 The US Supreme Court decision faced enormous criticism from different sides, including a strong dissent from Justices Breyer, Souter, and Ginsburg. Gattini called it the "infamous *Medellin v Texas* decision" in Gattini A., *supra* fn. 22, p. 1176. *See also*: Vazquez C.M., *Less than Zero?*, 102 AJIL 563 (July 2008). As one commentator observed, "the Supreme Court effectively left the U.S. free to ignore decisions of the International Court of Justice", Kontorovich E., *Italy Adopts Supreme Court's View of ICJ Authority*, Washington Post, 28 October 2014, available at: http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/28/italy-adopts-supreme-courts-view-of-icj-authority/ (5.02.2014).

The US Supreme Court's attitude is particularly incomprehensible in light of the fact that "the Supreme Court's treatment of the ICJ's decision in *Avena* is perfunctory and at odds with its prior practice", *see*: Greffenius R., *Selling Medellin: The Entourage of Litigation Surrounding the Vienna Convention on Consular Relations and the Weight of International Court of Justice Opinions in the Domestic Sphere*, 23 Am. U. ILR 943, 962 (2008). Its further jurisprudence in regard to VCCR and related ICJ decisions was described by Hoppe as an example of a *dialogue de sourds* between national and international courts rather than a fruitful conversation, *see*: Hoppe C., *Implementing of LaGrand and Avena in German and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EJIL 317 (2007), p. 335.

196 *Medellin case*, at 511: "In sum, Medellín's view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law" (emphases added).

197 *Ibid.*, at 513 – "the United States interpretation" is obviously understood as the Executive's interpretation; *see*, at 508.

198 *Brief for the United States as Amicus Curiae Supporting Petitioner, Medellin v. Texas*, available at: http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_

correct or proper is yet another question) but missed addressing the constitutional dimension of ICJ decisions[199] within the American legal regime.[200]

Yet, the case of Omar Fuentes Martinez may serve as another instance of an effort to enforce *sensu largo* the *Avena* judgment. His case was pending in 2009 before the Supreme Court of California as the defendant petitioned for a writ of *habeas corpus*[201] a second time. The first one was filed back in 2002 raising the violation of VCCR as the Californian authorities did not inform Martinez of his right to consular assistance, which was allegedly prejudicial for him during the pendency of the trial. The original petition was denied after consideration on merits. The repeated petition was filed on the basis, firstly, of the *Avena* judgment, in which Martinez's conviction was considered,[202] and secondly of the *President's Memorandum*, in which President George Bush decided that

> the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Additionally, the decision in the *Martinez case* was rendered after the controversial *Medellin case* decided by the United States Supreme Court.

The Supreme Court of California denied the subsequent *habeas corpus* petition as it was procedurally barred as successive and repetitive and based on the same factual background as the primary petition with no evidence of any change

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pdfs_07_08_06_984_PetitionerAmCuUSA.authcheckdam.pdf (21.12.2015), in which it is stated that "[t]he United States has a treaty-based obligation to comply with the *Avena* decision" (p. 7).

199 Justice Breyer's dissent, joined by Justices Souter and Ginsburg, at 538–68, is more than just a legal opinion. It is rather vivid and stimulating journey through the understanding of the Supremacy Clause over different periods of the history of the United States of America, well-founded in the jurisprudence of the US Supreme Court itself.

200 At the end of the discussion of the *Medellin case*, the practical remarks of Justice Stevens' concurring opinion emphasise the real ambiguity of the majority opinion, at 536–37: "One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that … ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another … The cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced Jose Ernesto Medellín … It is a cost that the State of Oklahoma unhesitatingly assumed. On the other hand, the costs of refusing to respect the ICJ's judgment are significant … When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation".

201 *In re Martinez*, 46 Cal.4th 945 (S. Ct. Call. 2009) [*Martinez case*].

202 *Avena case*, ¶ 16(15).

of circumstance that would have warranted reconsideration.[203] As far as the issue of enforcement of the World Court's decision was concerned, the court felt compelled, nevertheless, to discuss in passing its obligations under international law in relation to the *Avena case*.[204] It stressed that although Martinez's first and second petition were denied, such a situation did not mean that his notification claim under Article 36 VCCR had not been considered by component judicial organs. In particular, the court considered and assessed whether the defendant was prejudiced by the violation of his rights deriving from VCCR without applying any procedural bars – including the procedural default rule, and with the assumption that these rights, although rooted in the international treaty, were individually enforceable rights. The original petition was denied on its merits, as Martinez did not prove prejudice. According to the Supreme Court of California:

> petitioner's first habeas corpus petition asserted a violation of his Vienna Convention rights by police and the trial court. We reviewed and considered that claim, including, of course, whether petitioner was prejudiced by any violation of his article 36 rights. Specifically, we reviewed the declarations of the Mexican Consul General and the two witnesses whose presence the Mexican consulate would have obtained during his trial, Leonardo Armenta and Maximino Aviles, to determine whether petitioner was prejudiced either because he was denied the assistance the Mexican government could have provided him or denied the presence of these witnesses at his trial. In so doing, we effectively complied with the ICJ's directive … that the cases of the 51 Mexican nationals at issue in *Avena* be reviewed and reconsidered in light of the asserted violation of their article 36 right to consular notification to determine whether, as a result of that violation, those individuals suffered "actual prejudice." (*Avena, supra*, 2004 I.C.J. at p. 59, ¶ 121.) We denied the petition on its merits. Thus, this court has already considered petitioner's article 36 claim without reference to any procedural bar.[205]

Again, as in the *Torres case*, the state court, the highest one in the state of California, was inclined to enter into dialogue with the ICJ and comply with its decision, despite the fact that the outcome of this compliance was not positive for the petitioner.

The last instance of enforcement *sensu largo* that followed the *Avena* decision relates to the case of Carlos Gutierrez.[206] Accused of abusing his three-year-old

203 The court noted that the exhibits presented with the second *habeas corpus* petition were the same as in the instance of first petition and that the defendant did not "submit any new evidence of prejudice".

204 This discussion by the Supreme Court of California was not necessary to decide the case; nonetheless it resolved to explain its role in enforcing or complying with the US international obligations deriving from the ICJ decision.

205 *Martinez case*, at 957 (underline added).

206 *Avena case*, ¶ 16(51).

stepdaughter resulting in her death in June 1994, he pleaded no contest to first-degree murder and was sentenced to death. The Supreme Court of Nevada heard the appeal from the district court denial of his second post-conviction petition for a writ of *habeas corpus*. In *Gutierrez v. State of Nevada*,[207] the highest court of the state of Nevada concluded in September 2012 that Gutierrez was entitled to an evidentiary hearing regarding the applicability of procedural bars to his case. Interestingly, it explicitly stated that the capital punishment of the appellant was subject to independent proceedings in different fora, including obviously the *Avena case*, in which the violation of VCCR had been recognised in the form of "failing to inform Gutierrez of his right to consular assistance in defending his capital murder charge".[208] The Supreme Court of Nevada concluded, after consulting the US Supreme Court's decisions in the *Medellin case* and the *Leal case* together with the determinations of the Oklahoma Criminal Court of Appeals in the *Torres case*, that while, without legislative involvement in the implementation of *Avena*, "state procedural default rules do not have to yield to Avena, they may yield, if actual prejudice can be shown".[209]

On this basis, it was determined that the case of Gutierrez was distinguishable from *Medellin* and *Leal*, but analogous to *Torres*, as he "arguably suffered actual prejudice due to the lack of consular assistance".[210] This prejudice had two aspects. Firstly, the appellant at the time of his arrest was a young person with only a basic and poor command of English. Nevertheless, rather than proceed with a full trial, he pursued the unusual option of no-contest plea to first-degree murder, probably without apprehending the legal consequences of this step. Secondly, one of the interpreters assisting the trial court pleaded guilty a year after Gutierrez's trial to perjury committed during that trial, when he falsely confirmed that he was a certified and formally educated interpreter. What is more, during the trial other interpreters present had signalled some doubts as to the accuracy of the translation provided by the convicted interpreter. In order to assess whether these circumstances indeed amounted to the prejudice of Gutierrez, an evidentiary hearing was necessary in the opinion of the Supreme Court of Nevada. Notwithstanding, it was observed:

> What is clear, though, is if a non-Spanish speaking U.S. citizen were detained in Mexico on serious criminal charges, the American consulate was not notified, and the interpreter who translated from English into Spanish at the trail for the Spanish-speaking judges was later convicted of having falsified his credentials, we would expect Mexico, on order of the ICJ, to review the

207 *Gutierrez v. State of Nevada*, USA, Supreme Court of Nevada, 19 September 2012, Case no. 53506, 2012 WL 4355518.
208 *Ibid.*, p. 2.
209 *Ibid.*, p. 3.
210 *Ibid.*, p. 4.

> reliability of the proceedings and the extent to which, if at all, timely notice to the American consulate might have regularized them.[211]

Consequently, the requirement imposed by the ICJ in the *Avena case* on American courts to provide an effective remedy for individuals concerned in the form of the review and reconsideration of convictions within the overall judicial system was fulfilled, and the Supreme Court of Nevada enforced the judgment of the International Court of Justice within its jurisdiction.

All above municipal judicial decisions were rendered by American courts as repercussions of the judgment of the World Court in the *Avena case* ordering the United States to provide the adequate review and reconsideration of convictions and sentences imposed on Mexican nationals with the violation of VCCR. This international decision was utilised by the concerned defendants to petition municipal courts to set aside their sentences. None of these attempts proved to be successful for the petitioners. Nevertheless, all aforementioned rulings of state and federal American courts shall be perceived as typical instances of enforcement *sensu largo* by a third, private party against a judgment debtor.

2.2.2.2 Post-Jurisdictional Immunities *enforcement* sensu largo

The second ICJ case that resulted in subsequent proceedings on the municipal plane was the *Jurisdictional Immunities case* delivered on 3 February 2012 in a dispute between the Federal Republic of Germany and Italy with Greece intervening. The World Court found that Italy violated its international legal obligations in relation to the immunity enjoyed by Germany by proceeding with private parties' civil claims against Germany in its municipal courts in relation to events occurring in the years 1943–1945, by taking measures of constraint against German property in Italy, and by declaring the enforceability in Italy of Greek rulings rendered against Germany.[212] Moreover, the ICJ ordered that:

> the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.[213]

This judgment dealt exclusively with the conduct of judicial organs of the respondent that were found noncompliant with its international legal obligations and mandated *restitutio ad integrum* in relation to courts' decisions. Germany took advantage of this favourable pronouncement as a legal defence in proceedings still pending in Italian courts. Subsequent procedural actions undertaken

211 *Ibid.*, pp. 8–9.
212 *Jurisdictional Immunities*, ¶ 139(1)–(3).
213 *Ibid.*, ¶ 139(4).

by Germany within the Italian system of justice are categorised as enforcement *sensu largo* in the second form presented at the beginning of this chapter. The *Jurisdictional Immunities case* was enforced before municipal courts by the judgment-creditor against private parties, here individual claimants seeking compensation from Germany.

The first decision of Italian courts to follow the ICJ judgment came less than a month and a half after the International Court of Justice rendered its judgment in the *Jurisdictional Immunities case*. It was indeed a very strong voice of compliance with Italian international obligations. The Tribunal of Florence in the *Toldo case*[214] had first to consider the World Court's judgment in light of the fact that the highest Italian court – the Court of Cassation in Rome – had already established Italian jurisdiction in this particular case[215] as a preliminary issue and its decision was final and enjoyed the status of *res judicata*. The *Cassazione* did not have a chance to change or confirm its previous ruling after the ICJ decision, so the *Tribunale di Firenze* had to face and resolve the conflict between Article 324 of the Italian Civil Procedure Code and Article 2909 of the Italian Civil Code on one hand and Article 94 of the UN Charter and Article 11 of the Italian Constitution[216] on the other. The aforementioned municipal regulations govern the finality of judicial decisions of the Court of Cassation, and the judgment of the International Court of Justice was by virtue of Article 60 of the ICJ Statute similarly final and without appeal. Thus, the tribunal was in fact confronted with two final judicial decisions with different conclusions to follow. As it underlined the "strong peculiarities" (*forte peculiarità*) of the case, the *Tribunale di Firenze* decided that this conflict should be addressed from the standpoint of the "different binding force" (*diversa forza cogente*) of these two sets of norms. Aforementioned domestic provisions "have the value of ordinary laws", while Article 94 of the UN Charter enjoys "a superior value and efficacy" in light of the fact that "Article 11 of the Constitution puts the international conventional norms that limit our sovereignty

214 *Paolo Toldo v. Repubblica Federale di Germania*, 14 March 2012, Tribunal of Florence, Italy, Case no. 16410/2004 [*Toldo case*]. It needs to be explained that Nesi in his article Nesi G., *The Quest for a 'Full' Execution of the ICJ Judgment in Germany v. Italy*, 11 J. of International Criminal Justice 185 (2013) mentions only the case and the name of the tribunal that rendered it without any indication of a date or an official case number. Nevertheless, translated and cited parts of the judgment have enabled the identification of the decision as the *Toldo case* in connection with the translation and citation of Carlo Focarelli in his book Focarelli C., *International Law as Social Construct. The Struggle for Global Justice*, Oxford University Press 2012. It seems that the *Toldo case* has not been officially reported and published, thus the author has had access to it only through the aforementioned article and book.

215 *Repubblica Federale di Germania v. Paolo Toldo*, 29 May 2008, Court of Cassation, Italy, Case no. 14202/2008, available at: http://www.ilcaso.it/giurisprudenza/archivio/3237.php (09.02.2015).

216 *Constitution of the Italian Republic*, Gazzetta Ufficiale No. 298 of 27 December 1947, Article 11: "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations".

(among which, Article 94 of the UN Charter) at a constitutional level".[217] Therefore, it was concluded that by virtue of Article 94 of the UN Charter in connection with relevant constitutional provisions, the ICJ judgment prevailed over the Court of Cassation decision on jurisdiction.

Additionally, the Florentine court reached interesting conclusions in relation to the enforcement of *Jurisdictional Immunities* in domestic jurisdiction. It observed that "while the *giudicato interno* crystallizes a compulsory principle for the parties, the ICJ decision does not have any direct effect for the parties, but it is compulsory for the judge, as a State organ". Furthermore, it

> does not operate at the same level of the Court of Cassation, that interprets the law; it is rather constitutive of the law. The ICJ decision is equivalent, thanks to its insertion in the internal legal order, to a *jus superveniens* that, while not impinging upon the private relationship debated in court, has immediate and compulsory effect on the margin of appreciation of the judge.

The reasoning presented by the *Tribunale di Firenze* explicitly indicates that decisions of the World Court are binding on judicial organs of a State concerned that have to comply and respect them, irrespective of the private parties' claims and their basis. The statement that

> Art. 94 UN Charter places on UN member states an obligation to comply with the judgments of the ICJ, it does not address to a particular state institution (Executive, Parliament …), but rather to all institutions and organs which make up the state, among which courts are also included[218]

further reaffirms this conclusion.

Another judicial decision originating from Italian courts that directly referred to and enforced the judgment in the *Jurisdictional Immunities case* was issued within three months of the decision of the ICJ. The Court of Appeals of Turin considered the appeal of Germany from the Tribunal of Turin judgment awarding damages to De Guglielmi for deportation and forced labour during the Second World War. It found the case inadmissible as the examination of the merits of the case was precluded on the basis of the *Jurisdictional Immunities* decision.[219] According to the Turin court, the obligation to comply with this judgment of the World Court derives from Article 94 of the UN Charter and Article 59 of the ICJ Statute, to which Italy is a party.

217 All translation of this case, with slight modifications by the author, is provided after Nesi G., *supra* fn. 214, pp. 188–9.

218 Translation after Focarelli C., *supra* fn. 214, p. 354, fn. 677.

219 *Germany v. De Guglielmi and De Guglielmi and Italy*, 14 May 2012, Court of Appeals of Turin, Italy, Case no. 941/2012, ILDC 1905 (IT 2012), ¶ 17 and 19 [*De Guglielmi case*].

This straightforward understanding of the status of ICJ decisions within the Italian legal regime had to be, however, confronted with the fundamental principle of *res judicata* of national judicial decisions. That particular problem was also noticed by the World Court in its reasoning, but no solution was proposed for national adjudicators as the ICJ focused all its attention on the international dimension of the matter by stating:

> [i]t has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution.[220]

Consequently, the Turin Court of Appeals was left with the prominent matter of the interplay between the international obligations of Italy in relation to compliance with international tribunal decisions and its impact on final rulings of Italian courts. It found a Solomon-like solution by observing both the international law and municipal rules governing civil procedure in Italian courts.

The Italian Court of Cassation had already affirmed Italian jurisdiction over Germany before the trial court rendered its damage decision, and this ruling was already final and enjoyed the effect of *res judicata*. Thus, it could not have been altered. Nevertheless, the Turin court observed that the determination of the Court of Cassation in relation to jurisdiction, pursuant to Article 386 of the Italian Procedural Civil Code, did not influence the following examination of claims together with their admissibility. The *Jurisdictional Immunities* decision was doubtlessly a "meaningful novelty that modifies the entire framework of reference of the Court of Appeals compared to the one taken into account by the Court of Cassation when it decided on jurisdiction".[221] Furthermore:

> the ICJ decision constitutes an obligation not only for Italy but also, through Articles 10[222] and 11 of the Constitution, for the judge that should adopt decisions in conformity with the law, and thus also with the norms of customary international law referred to in Article 10 of the Constitution, as well as, on the basis of Article 11 of the Constitution, to the international treaties provisions adhered to by Italy, such as the norm enshrined in Article 94 of the UN Charter, a provision that imposes the respect of the ICJ decisions.[223]

220 *Jurisdictional Immunities case*, ¶ 137.

221 *De Guglielmi case*, ¶ 18; translation after Nesi G., *supra* fn. 214, pp. 189–90.

222 Article 10: "The Italian legal system conforms to the generally recognised principles of international law".

223 *De Guglielmi case*, ¶ 18; translation after Nesi G., *supra* fn. 214, p. 190.

On these premises, the case was found inadmissible as the international law considerations exclude any further assessment of the case merits.

The *De Guglielmi case* leads to two interesting reflections. Firstly, it proves that at least some municipal courts recognise that Article 94 of the UN Charter may be the source of an obligation to comply with and respect ICJ decisions by domestic judges. Consequently, this provision is in this light self-executing and may be a basis for enforcement *sensu largo*. Secondly, while deciding this particular case, the Turin Court of Appeals encountered a direct conflict between the ICJ judgment requiring the granting of immunity and the Court of Cassation decision recognising the jurisdiction of Italian courts in respect to Germany. Both those rulings enjoy the status of *res judicata*, the former in accordance with Article 60 of the ICJ Statue and the latter under relevant domestic laws. Despite the conflict, the Italian court managed to respect both. The example of the *De Guglielmi case* indicates that national courts are able to respect parallelly international and domestic legal orders with a bit of good faith, a friendly but not hyper-enthusiastic approach to international law, and a reasonable interpretation of municipal procedural institutions.

Additionally, this particular case underlines the significance of the constitutional norms of each State in regard to decisions of the International Court of Justice. Although this conclusion may be obvious or even trivial, the legal structure of the reasoning of the Turin Court of Appeals indicates that the international law-friendly interpretation of particular constitutional provisions enables the enforcement *sensu largo* of ICJ rulings directly in municipal courts without additional legislative steps. The constitutional rules referred to by the Italian court in its judgment resemble similar or analogous principles envisaged in constitutions world-wide, principles governing the status of international law within municipal regimes. Next, the reasoning in the *De Guglielmi case* reflects upon the new aspect of the enforcement mechanism of international judicial decisions. It shifts the emphasis from the standing of private parties in enforcing their internationally recognised rights to the direct obligations of courts as State organs to render rulings that comply with the international obligations of Italy. Consequently, the constitutional regime of Italy coupled with relevant provisions of the United Nations Charter and the Statute of the International Court of Justice obligating the State to comply with and respect the decisions of the World Court as final and binding enabled the Turin court to conclude that the ICJ judgment is directly binding upon judicial State organs, not only upon a generic and abstract concept of Italy as a State.

Soon enough, the Italian Court of Cassation was requested to express its attitude toward the *Jurisdictional Immunities* judgment in the *Albers case*.[224] This decision could not be assessed as blind obedience to the World Court's decisions but rather an example of a substantial dialogue with a drop of bitter criticism. The

224 *Military Prosecutor v. Albers and Others and Germany*, 9 August 2012, Court of Cassation, Italy, Case no. 32139/2012, ILDC 1921 (IT 2012) [*Albers case*].

Cassazione was not convinced by the thesis of the ICJ that no conflict between *jus cogens* rules and State immunity principles existed as the former was substantive in nature and the later procedural in character. This approach was considered as "unduly restrictive" and contributing to the ineffectiveness of pre-emptive norms, and consequently affirmed the impunity.[225] Furthermore, the highest Italian court recognised its legitimacy and role in shaping the substance of international law in relation to State immunities. The *Ferrini* jurisprudence[226] had undeniably been an attempt at such shaping, additionally "inspired by the principles of legal civilization".[227]

Despite these discrepancies, the judges of *Piazza Cavour*, in the wake of the ICJ judgment, decided to abandon its settled jurisprudence in relation to Germany's liability for Nazi crimes before Italian courts as expressed in the famous, already mentioned *Ferrini case*. The International Court of Justice was recognised as the "unquestionable authority", with "legal soundness" and persuasiveness. Consequently, the *Jurisdictional Immunities case* was acknowledged as a summary on the current state of law on State immunity. The Court of Cassation took cognisance of ICJ's extensive reference to national judicial case-law and recognised the substantial isolation of the position of Italian judges in respect to State immunity that "if not 'validated' by the international community – whose highest expression is given by the Hague Court – has not, or has not yet, been shared and for this reason cannot be further applied".[228]

As to the question of the domestic effect of ICJ decisions before municipal courts and the obligation of Italian judges to comply with these judgments, the highest Italian court highlighted the principle of absolute judicial independence and autonomy in adjudication and, hence, concluded that it was not directly bound to follow the ICJ.[229] Nonetheless, in order not to exacerbate the situation of Italy within the international community by not respecting its international obligations both in relation to State immunities and to the judgment of the ICJ and in order

225 *Albers case*, ¶ 5. *See also*: Fontanelli F., *State Immunity for International Crimes: The Cassazione's Solitary Breakaway Has Come to an End (judgment 32139/2012)*, Diritti comparati, available at: http://www.dirittocomparati.it/2012/10/state-immunity-for-international-crimes-the-cassaziones-solitary-breakaway-has-come-to-an-end-judgme.html (4.02.2015).

226 *Ferrini v. Germany*, 11 March 2004, Court of Cassation, Italy, Case no. 5044/2004, ILDC 19 (IT 2004) [*Ferrini case*] and subsequent cases based on the *Ferrini* precedent, in which the Court of Cassation recognised the Italian court's jurisdiction over Germany in relation to damage actions brought by victims or their heirs of war crimes and crimes against humanity committed by Nazi armed forces or paramilitary units.

227 *Albers case*, ¶ 6.

228 *Albers case*, ¶ 6, translation after Nesi G., *supra* fn. 214, p. 191 with a slight modification of the author.

229 Unfortunately, this part of the judgment is rather very vague and limited to a simple statement that does not allow comprehending the Court of Cassation's position on the effect of ICJ decisions in Italian legal order. In the opinion of Amoroso expressed in the Oxford Reports on International Law, "[t]his curtailment of judicial independence, in fact, appears justified by Article 11 of the Constitution", *see*: Amoroso D., *Military Prosecutor v. Albers and Others and Germany*, 9 August 2012, Court of Cassation, Italy, Case no. 32139/2012, ILDC 1921 (IT 2012), A5.

to act in conformity with the status of current customary law governing State immunities as authoritatively expressed by the World Court, the *Cassazione* opted for granting Germany immunity from jurisdiction in Italian courts, even if the acts concerned were of a heinous nature. Therefore, a decision of the Military Court of Appeal of Rome ordering Germany to pay reparations was annulled without re-trial. Notwithstanding, the Court of Cassation also expressed the view that although the attempt to strengthen *jus cogens* norms at the expense of State immunities had failed, exceptions to absolute State immunity would be possible in the future. This non-recognition of a direct obligation to follow the ICJ decision, but the full compliance with it on the basis of other considerations caused, as Fontanelli observed, "a slight and involuntary comic effect".[230] Nevertheless, the Italian Court of Cassation:

> net of all the *dicta* aimed at explaining why it still believed to be sort-of-right, has displayed a remarkable degree of deference to the authority of the ICJ, on an issue of considerable political weight. In so doing, it had to swallow its pride and grant immunity to Germany, but the result is uplifting: Italy is a good citizen of the international community, and its State organs are aware of the obligations it has entered in. Far from creating a schizophrenic situation like those of the *Avena* and *LaGrand* cases … the Italian judiciary acted responsibly and spared Italy from further troubles at the international level.[231]

This approach to the judgment of the International Court of Justice was further reaffirmed by the Court of Cassation in a later case of *Frascà v. Germany and Giachini*,[232] where again the *Ferrini* precedent was rejected. The plenary session of the *Cassazione* found that Germany was entitled to immunity from jurisdiction for acts *jure imperii*.[233] This conclusion, in the opinion of the Italian court, was

230 Fontanelli F., *supra* fn. 225. Also Cataldi expressed his criticism as to the conclusion of the Court of Cassation that there was no "direct and immediate obligations" to follow ICJ's lead "as it seems to contend that implementation of the ICJ's decision has been decided for reasons of comity and political opportunity, rather than as a result of an obligation that also rests on the Court", *see*: Cataldi G., *The Implementation of the ICJ's Decision in the* Jurisdictional Immunities of the State *Case in the Italian Domestic Order: What Balance Should Be Made between Fundamental Human Rights and International Obligations?*, 2(2) ESIL Reflections (24 January 2013), available at: http://www.esil-sedi.eu/sites/default/files/Cataldi%20Reflections.pdf (5.02.2015).

231 Fontanelli F., *ibid.*

232 *Frascà v. Germany and Giachini (Guardian of Priebke)*, 21 February 2013, Court of Cassation, Italy, Case no. 4284/2013, ILDC 1998 (IT 2013) [*Frascà case*]. Bruno Frascà – son of a victim of the Fosse Ardeatine massacre of 1944, in which 355 civilians were executed as a response to an attack on and killing of 32 German soldiers – launched a civil suit against Priebke (the SS captain responsible for the massacre) and Germany requesting damages. As Germany invoked state immunity, the plaintiff moved the Court of Cassation for a preliminary order on jurisdiction in the light of *Ferrini case*. The Court of Cassation issued its jurisdiction order after the *Jurisdictional Immunities* decision.

233 As Amoroso explained in its discussion of the case in Oxford Reports on International Law, under Article 374 of the Italian Civil Procedure Code holdings of the Court of Cassation in its plenary

further strengthened by the Italian Parliament that adopted Law no. 5 of 14 January 2013 requiring Italian judges to comply with the *Jurisdictional Immunities* judgment.[234] On the basis of this law, a lack of jurisdiction was declared in relation to the Federal Republic of Germany.[235]

This analysis of the Italian judiciary response to the *Jurisdictional Immunities* judgment would not be complete without the final word of the Court of Cassation in the *Ferrini case* that came full circle with its ups and downs through the Tribunal of Arezzo, the Court of Appeal of Florence, the International Court of Justice back to the Court of Cassation. On 21 January 2014, the latter court confirmed its adherence to its previous line of argument concerning the ICJ decision by granting the German appeal and reversing without amendment the decision of the Court of Appeal of Florence as the jurisdiction of Italian courts was excluded in relation to damage cases lodged against Germany on the basis of Law no. 5 securing compliance with the *Jurisdictional Immunities* judgment.[236] With this ruling, the *Ferrini* saga, that has become the seedbed of the German-Italian dispute finally reaching the International Court of Justice,[237] was finally brought to an end. The main premise of the *Ferrini case* was that the customary rule of State immunity should yield before the *jus cogens* principle of the prohibition of international crimes. On that basis, the jurisdiction of Italian courts over German acts committed by its armed forces in Italy during the Second World War was upheld. Subsequently, it led to a flood of similar suits against Germany launched by private individuals in Italian courts. In the discussed ruling, the Court of Cassation once and for all abandoned the *Ferrini* jurisprudence and complied with the *Jurisdictional Immunities* decision. In its exceptionally short judgment, the *Cassazione* referred only to Article 94 of the UN Charter, the ICJ Statue as a whole, Article 11 of the Italian Constitution, and Article 3 of Law no. 5 of 2013 as the legal basis of the opinion and rejected all arguments relating to the unconstitutionality of Article 3 of Law no. 5 of 2013, as

session may be overruled only by the plenary session; therefore "this precedent was intended to govern the issue of state immunity for international crimes for a long while", *see*: Amoroso D., *Frascà v. Germany and Giachini (Guardian of Priebke)*, 21 February 2013, Case no. 4284/2013, ILDC 1998 (IT 2013), A1.

234 Article 3 (1) of this Law no. 5 provided that "[f]or the purposes of Article 94, paragraph 1, of the Charter of the United Nations … where the International Court of Justice, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting a specific conduct of another State to civil jurisdiction, the judge hearing the case, *ex officio* and even where he has already passed a decision which is not final but has the effect of *res judicata* with regard to the existence of jurisdiction, shall ascertain the lack of jurisdiction in every stage and instance of the proceeding", citing after Alessandro Chechi from his comment to the Oxford Reports on International Law, Chechi A., *Federal Republic of Germany v. Ferrini and Ferrini*, 21 January 2014, Case no. 1136, ILDC 2724 (IT 2014), F5.

235 *Frascà case*, ¶ 6.

236 *Federal Republic of Germany v. Ferrini and Ferrini*, 21 January 2014, Court of Cassation, Italy, Case no. 1136, ILDC 2724 (IT 2014).

237 *Jurisdictional Immunities case*, ¶ 27–8.

> [n]o doubt of constitutionality can be shadowed with regard to the provisions of Art. 3 of the Act in question, provided that they are laid down for the purposes referred to in Article 94, paragraph 1, of the Charter of the United Nations.

Additionally, the attitude of the court expressed in the decision clearly indicates the willingness to engage in inter-judicial dialogue with other municipal courts and international tribunals on the issue of immunity. It recognised the authority of the World Court, but at the same time expressed some doubts about the current status of international law and the need to develop it. The role played by the Italian courts in implementing the *Jurisdictional Immunities case* was hailed as "a model of compliance", as "the Italian judiciary has taken the ICJ judgment very seriously, and promptly complied with the obligation to execute",[238] and indeed should be assessed as such.

Nevertheless, the discussed rulings of the Italian Court of Cassation did not settle the dust.[239] On the same day as the aforementioned decision ending the *Ferrini* saga was rendered, the Tribunal of Florence requested the Italian Constitutional Court to examine the constitutionality of the compliance measures adopted by the Italian Republic in relation to the decision of the International Court of Justice in the *Jurisdictional Immunities case*. The constitutionality challenges concerned Article 1 of Law no. 848 of 17 August 1957 ratifying the UN Charter in relation to Article 94 of the Charter requiring compliance with ICJ decisions; Article 3 of Law no. 5 of 14 January 2013 ordering judges to comply with the judgment of the World Court by respecting German immunities; and international customary rules regarding State immunities as determined by the ICJ and incorporated into the Italian legal system by virtue of Article 10 of the Constitution. All three types of norms were questioned in relation to the principle of absolute guarantee of judicial protection as expressed in Articles 2 and 24 of the Italian Constitution.

In its judgment of 22 October 2014,[240] the Constitutional Court shared in essence the reasoning of the Tribunal of Florence. Firstly, the doctrine of counter-limits or *controlimiti* stating that

> the fundamental principles of the constitutional order (*principi fondamentali dell' ordinamento costituzionale*) and inalienable human rights constitute a "limit to the introduction … of generally recognized norms of international

238 Nesi G., *supra* fn. 214, pp. 185 and 192–3.

239 Schilling Th., *The Dust Has Not Yet Settled: The Italian Constitutional Court Disagrees with the International Court of Justice, Sort of*, EJIL: Talk!, available at: http://www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/ (30.01.2015).

240 *Judgment No. 238/2014*, 22 October 2014, Constitutional Court, Italy, official English translation available on the Italian Constitutional Court, available at: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (30.01.2015) [*Judgment No. 238/2014*].

> law, to which the Italian legal order conforms under Article 10, para. 1 of the Constitution"[241]

was reaffirmed. The constitutional guarantee of effective access to justice being the right to appear and be defended before a court of law in order to protect one's rights was acknowledged as a fundamental principle, particularly in relation to human rights. Secondly, the judicial protection principle may be limited in relation to States' immunity from jurisdiction but only on the basis of public interest prevailing over the "supreme principles". But

> [i]n the present case, the customary international norm of immunity of foreign States, defined in its scope by the ICJ, entails the absolute sacrifice of the right to judicial protection, insofar as it denies the jurisdiction of [domestic] courts to adjudicate the action for damages put forward by victims of crimes against humanity and gross violations of fundamental human rights.

Furthermore, "in the constitutional order, a prevailing public interest that may justify the sacrifice of the right to judicial protection of fundamental rights (Articles 2 and 24 Constitution), impaired as they were by serious crimes, cannot be identified".[242] Moreover, possible limits in the form of State immunity in Italian courts may be granted to protect the sovereign function of States. Nonetheless, the German activities as a basis for damage actions initiated in Italian courts by victims or their relatives "do not represent the typical exercise of governmental powers" but were even unlawful under international law as admitted by Germany itself and affirmed by the International Court of Justice in its judgment.[243]

Consequently, both challenged provisions of the Italian law that required compliance with the ICJ decision in the form of denying the jurisdiction of municipal courts in civil cases pertaining to violations of human rights and international humanitarian law were declared unconstitutional. The situation was a little different with the customary State immunity rule as determined by the International Court of Justice. As a rule, the customary international law is incorporated into the Italian legal order by virtue of Article 10 of the Constitution. But "so long as"[244] a customary norm is not in conformity with fundamental constitutional

241 *Ibid.*, ¶ 3.2.

242 *Ibid.*, ¶ 3.4.

243 *Jurisdictional Immunities case*, ¶ 52–3.

244 Fontanelli rightly notices that this approach of European constitutional courts in relation to international or transnational judicial decisions is not new and resembles the *Solange* saga concerning the recognition of the effect of the ECJ decisions in national legal orders, *see*: Fontanelli F., *The Italian Constitutional Court's Challenge to the Implementation of the ICJ's Germany v Italy Judgment*, 30 October 2014, iLawyer, available at: http://ilawyerblog.com/italian-constitutional-courts-challenge-implementation-icjs-germany-v-italy-judgment/ (5.02.2015); *Solange I Case*, BVerfGE 37, 271, 2 BvL 52/71, 29 May 1974, Federal Constitutional Tribunal, Germany and *Solange II Case*, BVerfGE 73, 339, 2 BvR 197/83, 22 October 1986, Federal Constitutional Tribunal, Germany.

principles, it has not been introduced into the Italian regime and, thus, has no effect. As such a conflict was recognised in relation to the customary State immunity for acts *jure imperii* violating international law; thus the Constitutional Court could not declare the relevant rules unconstitutional as these norms have simply not become domestic law. Consequently, under the ruling judicial protection is afforded by individuals whose rights were violated by Germany during the Second World War.

Some commentators[245] equalled *Sentenza* No. 238 with the US Supreme Court's *Medellin case*. Such a comparison is, however, unjustified and misses major differences those two judgments present in relation to the World Courts' pronouncements. The Italian Constitutional Court decided to follow its own constitutional principle of judicial protection instead of ICJ directives regarding State immunities in case of grave breaches of international law amounting to war crimes and crimes against humanity. That court had to balance two constitutional norms concerning the status of international law in the municipal order and individual rights to protection before a court of law. The controversy before the US Supreme Court was of much smaller calibre as it was requested to balance the state procedural default rule against the obligation to comply with international decisions rendered on the basis of treaties dully ratified by the United States. Moreover, the US Supreme Court refused ICJ decisions any binding force within the American legal order. The Italian Constitutional Court, on the other hand, did the opposite. It declared:

> it is certainly clear that the undertaking of the Italian State to respect all of the international obligations imposed by the accession to the United Nations Charter, including the duty to comply with the judgments of the ICJ, remains unchanged[246]

and limited the scope of its ruling exclusively to the obligation to deny jurisdiction in cases concerning State *acta juri imperii* amounting to war crimes and crimes against humanity. Hence, it is implied that the Italian State and its courts are bound to follow the World Court's lead in relation to international law. Thirdly, *Medellin* focused on the question of whether the *Avena* judgment was of itself binding federal law as self-executing international instrument and the answer was negative. The Italian Constitutional Court was rather occupied with the problem of the constitutionality of the methods of implementing the *Jurisdictional Immunities* judgment – namely legislative means of compliance – rather than with the judgment itself. It found that the methods proposed by the Italian government and adopted

245 Kontorovich E., *supra* fn. 195; Schilling Th., *supra* fn. 239; Fontanelli F., *I Know It's Wrong but I Just Can't Do Right: First Impressions on Judgment no. 238 of 2014 of the Italian Constitutional Court*, 27 October 2014, Verfassungs blog, available at: http://www.verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court/#.VNOK4aAySW8 (5.02.2015).

246 *Judgment No. 238/2014*, ¶ 4.1.

by the Parliament were not adequately balanced with *principi fondamentali dell' ordinamento costituzionale*, but this conclusion did not imply a lack of binding force of the ICJ decision itself within the domestic system. Finally, the status of norms, on which the Italian Constitutional Court and the US Supreme Court based their respective decisions, are different.[247] The former decided that the constitutional rule of fair trial should be respected, regardless of the opinion of the World Court. But this constitutional norm is "deeply internationalized" in the sense that it finds its expression in basic international instruments pertaining to human rights as well as in most national constitutions. One may even argue that there exists a conflict between a duty to comply with the decision of the ICJ and an obligation to safeguard fundamental rights as expressed on the international and domestic plane. The US Supreme Court did not face a similar controversy. The procedural default doctrine is merely a technical rule developed within a specific domestic legal regime with no international dimension nor internationalised scope.

Notwithstanding, what is of the highest importance in relation to enforcement *sensu largo* is distinct attitudes vis-à-vis ICJ decisions presented by the American and Italian court. The highest federal court of the United States in the *Medellin case* expressed the opinion, constituting *stare decisis* on lower courts, that all ICJ rulings are not binding within the United States and judges, either federal or state, are not obligated to follow them. On the other hand, the Italian Constitutional Court as a principle confirmed the rule that ICJ decisions by virtue of Article 94 of the UN Charter are binding within Italy and national adjudicators are bound to respect them. This duty may only be limited by the "fundamental principles of the constitutional order and inalienable human rights" as in case of the *Jurisdictional Immunities* judgment. Therefore, the Constitutional Court declared:

> the unconstitutionality of Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Charter, signed in San Francisco on 26 June 1945), so far as it concerns the execution of Article 94 of the United Nations Charter, exclusively to the extent that it obliges *the Italian judge to comply* with the Judgment of the ICJ of 3 February 2012, which requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights.[248]

The direct reference to the obligation of the Judiciary or even every single Italian judge is symptomatic, as it underlines the understanding of Article 94 of the UN Charter by the Italian Constitutional Court as having a direct effect on the

247 Tzanakopoulos A., *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 Loyola of Los Angeles ICLR 133, 165 (2011–12).

248 *Judgment No. 238/2014*, ¶ 2. Similarly, the Constitutional Court seemed not to distinguish between the Italian Republic and its organs, when it declared: "the questioned provision … cannot be opposed to this principle, insofar as it binds the Italian State, and thus Italian courts, to comply with the Judgment of the ICJ of 3 February 2012", ¶ 4.1 (underlines added).

municipal legal order and explicitly on courts as State organs. Nonetheless, some dose of criticism is desirable:

> Superficially, the *Sentenza* No. 238 strengthens the position of the individual against the state. But on a more profound level, it strengthens unilateralism over universalism: It gives priority to one (state's) national outlook about what constitutes a proper legal order over the universal standard pronounced by an international court.[249]

The next instance of the enforcement *sensu largo* of the *Jurisdictional Immunities case* relates to the massacre of civilians in the village of Distomo in Greece carried out by the Nazis in 1944. The Prefecture of Voiotia on behalf of the victims filed a lawsuit against Germany and won compensation in Greek courts. Although enforcement proceedings both in Greece and Germany proved to be unsuccessful, the Court of Appeal of Florence granted the *exequatur*, which allowed the claimants to register a legal charge on Villa Vigoni. This property located near Lake Como and owned by Germany served as a cultural centre. As challenges against those measures within the Italian judicial systems were inefficient, Germany raised the matter before the International Court of Justice, which agreed with German argumentation. The ICJ found that "the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni" as well as "by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich".[250] Once the judgment of the World Court was rendered, the enforcement proceedings in Italy became difficult for the Greek claimants. On the motion of Germany as a judgment-creditor in the *Jurisdictional Immunities case*, the Tribunal of Como ruled in accordance with the ICJ decision as it found the Greek judgment unenforceable against Germany, although the previous judgment on *exequatur* was final and binding. Interestingly, in those proceedings the Presidency of the Italian Council of Ministers intervened voluntarily and supported the German line of argumentation. On appeal, the Court of Appeal of Milan declared measures of constraint taken against the Villa, which has been used for sovereign purposes, impermissible. Hence, the Region of Sterea Ellada – a legal successor of the Prefecture of Voiotia – challenged the latter ruling to the Italian Court of Cassation, which in June 2018 issued its decision.[251]

249 Peters A., *Let Not Triepel Triumph – How to Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order*, 22 December 2014, EJIL: Talk!, available at: http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/ (30.01.2015).

250 *Jurisdictional Immunities case*, ¶ 139(2) and (3).

251 *Region of Sterea Ellada v Presidency of the Council of Ministers and Germany*, Judgement no. 14885/2018, 8 June 2018, Italy, Court of Cassation, ILDC 2931 (IT 2018).

The *Cassazione* held that there were no grounds for lower courts to declare a Greek judgment unenforceable since the law implementing the *Jurisdictional Immunities case* was declared unconstitutional by the Constitutional Court, as already discussed. Furthermore, the proceedings before the Tribunal of Como were limited to the legal charge on Villa Vigoni, thus the Court of Appeal acted outside its competence by addressing a more general question of the enforceability of the Greek judgment in Italy. Nevertheless, it confirmed the factual assessment made by the Milan Court of Appeal in relation to the purpose of Villa Vigoni as no reassessment was permissible. Thus, Sterea Ellada's objection was rejected and the conclusion of the lower court that the property was used for sovereign functions or other public purposes was upheld. As a result, the Court of Cassation recognised the immunities of Germany in connection to the Villa in compliance with the judgment of the World Court. Notwithstanding, it declared "this judgment remains enforceable in Italy, with regard to foreign assets with characteristics different from Villa Vigoni".[252]

The final example of the enforcement by municipal courts was acknowledged by the International Court of Justice itself in its judgment. In the *Immunities and Criminal Proceedings case* the ICJ rendered an order on provisional measures on 7 December 2016, in which it indicated that

> France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises … at 42 Avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability.[253]

As the attachment of that property was only one aspect of the criminal proceedings against Teodoro Nguema Obiang Mangue, the case against him was not suspended before French courts. Eventually, the *Tribunal correctionnel* of Paris found the Vice-President of Equatorial Guinea guilty of money laundering on 27 October 2017. In its judgment, the French court ordered the confiscation of the attached building as well. Notwithstanding, the Tribunal referred in its decision to the order of the ICJ on provisional measures and stated that "the … proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty".[254] Already during a hearing, the President of the French Tribunal observed that due to the order of the World Court on provisional measures any confiscation or similar measure against the property at 42 Avenue Foch

252 *Ibid*.

253 *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, 2016 ICJ Rep. 1148, ¶ 99.

254 Cited after *Immunities and Criminal Proceedings case*, ¶ 36.

in Paris could not be executed until the conclusion of the proceedings before the International Court of Justice.[255]

The final judgment of the ICJ in the *Immunities and Criminal Proceedings case* was rendered on 11 December 2020. The Court decided that the "building at 42 avenue Foch in Paris has never acquired the status of 'premises of the mission'" and declared that France had not breached its international obligations.[256] In that decision, the ICJ explicitly referred to the decision of the Paris *Tribunal correctionnel* that ensured compliance with its previous order. While following the provisional measure order literally, the French court found a solution to give effect to the decision of the World Court and not to unduly influence the criminal proceedings before it. It imposed the penalty in the form of confiscation of the real property bought from proceeds of the crime but suspended its enforceability until the International Court of Justice issued the judgment.

2.2.3 Quasi-*enforcement of ICJ decisions*

Undoubtedly, Article 94(1) of the UN Charter obliges States to comply with decisions of the International Court of Justice in all cases to which they are parties. In situations when an ICJ ruling is rendered in a dispute between two States which relates to the treatment of citizens of one of these States by another, such a decision is binding upon both States and, consequently, on their organs and officers – including courts of law. Therefore, it may be argued that State courts are obligated by virtue of Article 94(1) of the UN Charter to comply with an ICJ decision in proceedings initiated by individuals who have been directly concerned by such a decision in order to enforce it in a domestic legal order. This reasoning cannot be, however, extended to apply to other private parties whose situation was not adjudicated upon by the International Court of Justice, including nationals of other countries, even if they find themselves in analogous situations. Such an extension would contravene the *res judicata* principle, which applies to a specific dispute between relevant parties in the defined factual background.

Notwithstanding, many conclusions reached by the International Court of Justice in its decisions relating to the scope and contents of international law are of general and universal character. In the *Avena case*, for example, the ICJ found that the United States acted against Article 36 VCCR in relation to 51 citizens of Mexico indicated by name in the final judgment.[257] Determinations of the ICJ concerned the execution and implementation of the Vienna Convention on Consular Relations – the multilateral treaty with 177 State parties[258] – and possible remedies in case of a violation of this international agreement both in relation to individuals

255 *Ibid.*, ¶ 35.

256 *Ibid.*, ¶ 126.

257 *Avena case*, ¶ 153(4).

258 The information is provided after the UN Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants (30.12.2014).

and States affected. Yet, the practice of not informing foreigners about their rights under VCCR and of not notifying consular offices about their citizens' detention in the United States had been widespread and systematic. It was not limited just to the several dozens of Mexicans named in the *Avena* judgment. This leads to a question whether the detained or convicted foreign citizens not indicated in the tenor of the ICJ decision, whose situation was similar to the ones mentioned in the judgment, may effectively rely on findings of the World Court before municipal courts reconsidering their cases.

At first sight, it appears that such a possibility is unfeasible as lacking any legal basis. Nonetheless, the International Court of Justice declared itself in favour of a solution enabling the universal application of legal remedies available under its decisions in the *LaGrand* and *Avena cases* to the accused or convicted deprived of consular protection due to a receiving State's violation. In the statement of reasons in the *Avena case* one may read:

> The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint or the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply, that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.[259]

This approach is surely innovative and progressive and, thus, might face some criticism from scholars and practitioners of a traditional attitude toward international litigation. Nevertheless, in the broader perspective, the ICJ's position contributes to a uniform interpretation and application of international treaties – in this particular case, of VCCR. Moreover, not only in the statement of reasons but also in the tenor of the judgment in the *Avena case*, the International Court of Justice extended the scope of its application in relation to all Mexican nationals. In point 10 of the operative clause the ICJ acknowledged the commitment undertaken by the United States during the pendency of the proceedings aimed at

259 *Avena case*, ¶ 151.

implementing necessary and specific measures adopted in performance of its obligations deriving from Article 36(1)(b) VCCR and decided that this commitment met the request of Mexico for certain guarantees and assurance of non-repetition of Article 36 violations. Notwithstanding, subsequently the World Court decided in the judgment operative clause that

> should Mexican nationals … be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (*b*), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.[260]

Exactly in circumstances of the extended application of ICJ decisions,[261] sanctioned by the World Court in its *Avena* judgment, the *quasi*-enforcement of ICJ rulings in municipal legal regimes takes place. It occurs when an individual, whom such a decision does not affect directly, but whose factual and legal situation is identical or comparable to the one examined by the Court, seeks a judicial remedy raising the enforcement argument. Consequently, in following municipal judicial proceedings, the identity of only one of the original parties appearing before the ICJ remains unchanged, predominantly that of the judgement-debtor State. The factual background is similarly alike, but not identical.

In passing, it should be noted that such an extended application of decisions of international tribunals is not a new device developed by the ICJ. Other international courts and institutions have long referred to it, particularly those competent in the field of human rights, addressing so-called systematic breaches of international obligations.[262] The European Human Rights Court has, for example, developed a pilot judgment procedure of its own, without any treaty basis, by amending its Rules. The new Rule 61 as revised in 2004 reads as follows:

> 1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or

260 *Ibid.*, ¶ 153(11).

261 The present author referred to the practice of the International Court of Justice in the *Avena case* as the extended application of ICJ decisions, but other terms have been also developed. E.g., Rosenne utilised "the doctrine of the impermissibility of an *a contrario* contention", *see*: Rosenne Sh., *supra* fn. 1, p. 1576.

262 For example, the Human Rights Committee in *Patricio Ndong Bee v. Equatorial Guinea*, Human Rights Committee, 31 October 2005, Communication Nos. 1152/2003 and 1190/2003, U.N. Doc. CCPR/C/85/D/1152 and 1190/2003, ¶ 8 determined that the petitioner were entitled to immediate release and adequate compensation and obligated Equatorial Guinea to "make the same solution available to other detainees and convicted prisoners in the same situation as the authors and to take steps to ensure that the violations cease and that similar violations do not occur in future".

other similar dysfunction which has given rise or may give rise to similar applications.

3. The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.[263]

The first case to be discussed as an example of *quasi*-enforcement concerned Ismael Juarez Cisneros. He was a Mexican national, whose criminal case was not considered by the ICJ in the *Avena case*. He entered the United States several times illegally and was subsequently arrested and deported. On one such occasion in 2004, he was questioned about the murder of Ms. Paz and made incriminating statements about his involvement in this crime. Although prior to his interrogation he was advised on his Miranda rights, including the right to remain silent, in Spanish – his mother tongue – and waived them in writing, he was not informed about his right to consular assistance. Cisneros was indicted on 24 June 2004 and only on 26 July 2004 did his lawyer contact the Mexican consular authorities. Later in a federal court, he moved to suppress his statements made to detectives during his interrogations as a remedy for the alleged violation. The District Court for the Eastern District of Virginia denied his motion, as "Mr. Cisneros failed to demonstrate that his trial was prejudiced by this violation".[264] Cisneros based his legal arguments directly on the *Avena* judgment. Moreover, the court in its decision found that both VCCR and its Optional Protocol are self-executing treaties and held an evidentiary hearing, at which the defendant and the Mexican consular officers testified. Nevertheless, it was found that no prejudice was shown, because

> Mr. Cisneros testified at the hearing on the motion to suppress that, had he been given the opportunity to call the Mexican Consulate, he would have heeded consular officials' advice to make no statement to law enforcement. The detectives who interrogated Mr. Cisneros informed him of his right to remain silent, yet he still gave extensive, incriminating statements. He assented to waiver of his Miranda rights both orally and in writing. Given these facts, Mr. Cisneros did not meet the burden of showing that he would have listened to the Mexican consulate and that he was prejudiced by the VCCR violation.

It was also observed in the *Cisneros case* that the Consulate did "render valuable assistance" during the penalty phase of the trial both to his attorneys and by making relevant witnesses available. The conduct of the District Court for the Eastern District of Virginia, although it was not directly stated in its decision, clearly complied with the obligation of the "review and reconsideration" as it carried

263 ECHR, *Rules of Court*, 1 June 2015, Rule 61.
264 *United States v. Cisneros*, 397 F.Supp.2d 726 (E.D.Va. 2005) [*Cisneros case*].

out sufficient evidentiary proceedings in order to establish whether the violation of VCCR prejudiced Cisneros in his trial and, therefore, it constituted the *quasi*-enforcement of the *Avena* judgment.

Nevertheless, the best illustration of this *quasi*-enforcement is the case *Commonwealth v. Gautreaux*[265] decided by the Supreme Judicial Court of Massachusetts in 2011. Amaury Gautreaux was born in the Dominican Republic and at the age of 14 moved to the United States. Nonetheless, he had never communicated fluently in English and had not obtained US citizenship. In 2003, he pleaded guilty and was convicted of assault and battery, threatening to commit a crime and possession of a class A substance. In May 2008, he was again arrested and in July he received an order of deportation from the United States Department of Homeland Security. In order to avoid the expulsion, at the beginning of 2009 Gautreaux moved to vacate his guilty plea and for a new trial raising the violation of Article 36 VCCR as the American authorities did not inform him of his right to consular protection. He also stressed the lack of an interpreter during the decisive part of the proceedings, during which the judge informed him about the consequences of a guilty plea, including the possibility of deportation. His motion was denied, but he appealed, and the case was transferred to the Supreme Judicial Court of Massachusetts on the latter court's motion. It is worth mentioning that the *Gautreaux case* has been decided already after the relevant decisions of the United States Supreme Court in *Breard v. Green* and the *Medellin case*.

According to the Supreme Judicial Court of Massachusetts, judgments in the *LaGrand* and *Avena cases* are binding on the United States, but not directly on the court hearing this particular case. Nonetheless, these decisions are entitled to "respectful consideration", as determined in *Breard v. Green*. On this basis, the court acknowledged and accepted in the legal system of the Commonwealth of Massachusetts the conclusions of the International Court of Justice regarding the obligation created in case of a violation of Article 36 VCCR. Taking into account the review and reconsideration standard ordered by the ICJ, in the opinion of the highest court of Massachusetts some process of review of "the soundness of a subsequent conviction" in light of the violation was required. This remedy shall be available to all convicted, not only to Mexican nationals named in the *Avena* judgment, due to the fact that the World Court did not limit its holding only to several dozen Mexicans mentioned in the decision, but rather indicated that it has universal application – the relevant part of the statement of reasons of the International Court of Justice was cited directly in the opinion in the *Gautreaux case*.

The positive approach of the Supreme Judicial Court of Massachusetts towards the judgment of the International Court of Justice was rooted not only in the acknowledgement of the obligation of the United States to comply with international law, but also in similarities between the Massachusetts process law and legal remedies ordered by the ICJ as a reparation for VCCR violations. For example,

265 *Commonwealth v. Gautreaux*, 458 Mass. 741 (S. Jud. Ct. Mass. 2011) [*Gautreaux case*].

the procedural default rule, which was the primary seed of the dispute settled by the ICJ, does not have application in the Commonwealth of Massachusetts. Furthermore, in the proceedings initiated by a motion for a new trial, a defendant must meet the standard of a substantial risk of a miscarriage of justice. In the setting of consular protection cases, a convicted foreigner needs to demonstrate that "the failure to comply with Article 36 of the Vienna Convention gave rise to a substantial risk of a miscarriage of justice"[266] that is to prove that "it is likely that if he had been notified of the rights provided in Article 36 of the Vienna Convention, the result of the criminal proceeding would have been different".[267] At least, it must be established that the assistance of a consulate would have had a favourable impact on the conclusion of the trial for a defendant, as explained by the highest Massachusetts court. This standard of review concurred with ICJ's directives regarding the "review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention".[268]

After setting the procedure and substantive standards of assessing the primary criminal proceedings, during which defendants' rights to consular protection have been violated, the Supreme Judicial Court put the criminal trial of Gautreaux to review and reconsideration. It was established that the presented evidence was not sufficient to meet legal conditions for a new trial. Additionally, it was determined that the legal assistance as anticipated by VCCR was provided to the defendant on the basis of the law of the Commonwealth of Massachusetts and the United States of America similarly as to all defendants. Regardless of whether the accused is an American citizen or a citizen of another State, when he or she is standing trial in the United States, the constitutional guarantees regarding a fair trial apply – including his or her right to the legal assistance of a public defender.

Other noteworthy judicial decisions amounting to *quasi*-enforcement relate to a Polish national – Grzegorz Madej, sentenced to death in the state of Illinois in 1982 after being found guilty of murder and felony murder. Since 2002 he had undertaken to have his sentence set aside on the basis of the *LaGrand case* decided by the International Court of Justice in relation to the German LaGrand brothers.[269] The US District Court for the Northern District of Illinois considering Madej's *habeas corpus* petition seemed not to notice the fact that the petitioner's country of origin – the Republic of Poland – was not party to ICJ proceedings and, therefore, the binding force of the *LaGrand* judgment could not extend to Polish nationals detained in the United States. The federal court passed over this

266 *Gautreaux case*, at 751.

267 *Ibid.*, at 752.

268 *Avena case*, ¶ 153(11).

269 *U.S. ex rel. Madej v. Schomig*, 223 F.Supp.2d 968, 978 (N.D. Ill. 2002) [*Madej case*]: "Petitioner presses the claim again in this court, asking to amend its judgment on the basis of the July 2001 International Court of Justice ruling in the LaGrand case". The consideration of first petition of *habeas corpus* may be found in *U.S. ex rel. Madej v. Gilmore*, 8 March 2002, No. 98-C-1866, 2002 WL 370222 (N.D.Ill. 2002).

lightly and found that "the I.C.J. interpretation of the interplay between the procedural default doctrine and the Vienna Convention is binding when considering an individual violation".[270] As the violation of Madej's right under the Vienna Convention on Consular Relations was indisputable, the only task for the judicial branch was to examine whether this breach had "a material effect" on the results of his criminal proceedings.

> [T]he effect of the violation, however, is somewhat muddy. If his rights had been respected, it is unlikely that the assistance of the Polish Consulate would have had an effect on the outcome of the trial. The evidence of Madej's guilt was substantial. It is possible, though, that the Consulate's participation would have had an effect on the sentencing hearing. [C]onsular functions are particularly significant during penalty proceedings in which courts determine whether capital punishment will be applied.[271]

Earlier, the district court had already found that the trial counsel did not meet standards by failing completely to investigate his client's background as preparation for the sentencing phase of the proceedings. Consequently, the participation of the Polish consular authorities would have been desirable at that stage and would have had a favourable impact for the defendant. Nevertheless, as the relief from the Madej's capital punishment was already granted by the court, the issue became moot. Nevertheless, in a footnote it was hinted that if the matter was not considered moot, the relief would not necessarily be granted on the basis of the VCCR violation as "there is no clear Supreme Court precedent about remedies for Vienna Convention violations".[272]

A similar approach was presented by the US Court of Appeals for the Seventh Circuit in relation to Johnbull K. Osagieda, a Nigerian national, who pleaded guilty to one count of heroin distribution.[273] During his trial and investigation, he was not informed about his right to consular assistance, thus he filed a petition for a writ of *habeas corpus*. In his petition, he decided to combine the Vienna Convention as well as a constitutional argument as he claimed that "he was denied his Sixth Amendment right to the effective assistance of counsel … because his lawyer sough no remedy for the Government's failure to notify him of his right to consular assistance".[274] The district court dismissed his petition without hearing, but the upper court vacated the order and remanded the case for further proceedings, hence guaranteeing review and reconsideration in line with ICJ's directives as to the remedy for VCCR violations. The Court of Appeals confirmed its

270 *Madej case*, at 980.

271 *Ibid.*

272 *Madej Case*, fn. 13. The US District Court for the Northern District of Illinois again considered the case of Grzegorz Madej on the respondent's second motion to reconsider, *see*: *U.S. ex rel. Madej v. Schomig*, --- F.Supp.2d --- (N.D. Ill. 2002), 22 October 2002, 2002 WL 31386480.

273 *Osagiede v. United States*, 543 F.3d 399 (7th Cir. 2008).

274 *Ibid.*, at 402.

decision that Article 36 VCCR confers individual rights, referring to the *LaGrand* and *Avena cases*. But what is more important, it observed that "[t]hrough ineffective assistance of counsel claims, 'full effect' could [be] given to Article 36", thus agreeing that "the Sixth Amendment could serve as a vehicle for vindicating Article 36 rights".[275] The US court found that the defendant's right to consular assistance had been violated and his defence counsel had failed to remedy the violation through simply notifying the Nigerian national of that right and raising the matter with the trial court. Consequently, it found that he was entitled to an evidentiary hearing to determine the prejudice.

Osagiede v. United States is an interesting example of securing compliance with international law and international judicial decisions though institutions of municipal law. The argumentation of both the defendant and the US Court of Appeals allowed effect to be given to directives of the International Court of Justice spelled out in the Consular triad through a constitutional claim pertaining to the effective assistance of counsel in criminal cases. The court found that "Illinois criminal defense attorneys representing a foreign national in 2003 should have known to advise their clients of the right to consular access and to raise the issue with the presiding judge".[276] This approach allowed the controversies of the *Medellin case* to be avoided, although the court mentioned it in footnotes, and the concrete domestic legal institution was utilised by the US court as a vehicle of enforcement of the international decision.

2.2.4 Municipal courts' implementation of ICJ advisory opinions

> The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force.[277]

This conclusion regarding the status of advisory opinions has been repeated in several other opinions issued by the International Court of Justice and seems intuitive. Thus, advisory opinions rendered by the ICJ do not have the same legal force as judgments or orders that enjoy special status under Article 94(1) of the UN Charter. The obligation to comply, as the literal meaning of the mentioned provision indicates, applies only to decisions in a strict sense, that is judgments and orders. Therefore, the term "enforcement" cannot be used in relation to advisory opinions as it is misleading and does not signify this fundamental difference between the advisory function of the ICJ and the dispute settlement function. The

275 *Ibid.*, at 407.
276 *Ibid.*, at 411.
277 *Interpretation of Peace Treaties*, Advisory Opinion, 1950 ICJ Rep. 65, p.71.

term "implementation"[278] is adopted in this study in relation to advisory opinions of the World Court.

Although it is not disputed that advisory opinions *per se* lack binding force in the formalistic sense, nevertheless, a number of scholars and practitioners emphasise that their binding-like force derives from the international norms on which opinions are based.[279] The fact that the specification of these international norms to a concrete situation or issue is undertaken in advisory proceedings in no way shall have any impact on the binding force of the rules. Furthermore, the International Court of Justice either in contentious or in advisory proceedings applies international law in the same way and manner. There exist no different sets of norms to be applied in two types of proceedings. As the ICJ in both clarifies the existence of international rights and obligations, its conclusions are binding due to the binding force of international law, and the mere fact of the formal non-binding character of advisory opinions is rather irrelevant. As Judge Komora observed in his separate opinion in the context of the *Wall Advisory Opinion*:

> The Court's findings are based on the authoritative rules of international law and are of an *erga omnes* character. The Court's response provides an authoritative answer to the question submitted to it. Given the fact that all States are bound by those rules and have an interest in their observance, all States are subject to these findings.[280]

Additionally, States acting within the United Nations have recognised the special legal character of advisory opinions and the obligation to implement or even comply with their findings. After the *Wall Advisory Opinion* was rendered, the UN General Assembly on 20 July 2004 after a long debate adopted by overwhelming majority Resolution ES-10/15 with 150 votes in favour, only 6 against and 10 abstentions.[281] In it, the UN General Assembly:

> 2. *Demands* that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion;
> 3. *Calls upon* all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion.[282]

278 Dubuisson F., *The Implementation of the ICJ Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, XIII Palestine YIL 27, 29 (2005).

279 E.g., Thirlway H., *The International Court of Justice* [in:] *International Law*, ed. Evans M. D., Oxford University Press 2003, p. 582.

280 *Wall Advisory Opinion* (Judge Koroma, sep. op.), ¶ 8.

281 UN General Assembly, *Official Records. Tenth Emergency Special Session. 27th Meeting*, 20 July 2004, UN Doc. A/ES-10/PV.27, pp. 5–6.

282 UN General Assembly, *Resolution ES-10/15. Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Including in and around East Jerusalem*, 2 August 2004, UN Doc. A/RES/ES-10/15 (underline added).

There are also additional arguments supporting the view that advisory opinions are of legal and moral authority and as such are suitable for implementation. Firstly, in understanding the legal authority of advisory opinions the emphasis should not be put on the word "advisory". Hudson argued, "they are advisory. Not legal advice in the ordinary sense, not views expressed by counsel for the guidance of client, but pronouncements as to the law applicable in given situation formulated 'after deliberation by the Court'".[283] Opinions of ICJ are not private opinions, but rather official pronouncements on the current status of international law in a given situation explaining and presenting the rights and obligations of the subjects involved. Secondly, as already suggested, the resolution of presented legal issues by the ICJ is performed in contentious proceedings and in advisory proceedings in the same way, as there is only one way of declaring law. "The judicial function remains the same, whether proceedings are contentious or advisory"[284] and, consequently, "the two procedures and their results are by and large equivalent".[285] Both of them are rooted in the basic judicial function of the International Court of Justice that assumes "the same fundamental principles of objectivity".[286] Thirdly, Article 38 of the ICJ Statute seems not to distinguish in its reference to judicial decisions as "subsidiary means for the determination of rules of law" between advisory and contentious cases. Finally, and surprisingly, the effect of advisory opinions is not limited by Article 59 of the ICJ Statute that confines the binding scope of judgments only to parties to a particular case. Although they are not formally binding, advisory opinions are more general and abstract as addressing rather a legal issue than a dispute rooted in its factual background. It was even argued that they are of *erga omnes* character.[287] Thus, not surprisingly, even the International Court of Justice itself refers in its jurisprudence to its former decisions: judgments and advisory opinions on the same footing without distinguishing between these two categories and their legal effects.[288]

Notwithstanding, although advisory opinions are non-binding in a formal sense, it does not imply that they may never be binding. The practice of international law has developed so-called "compulsive advisory opinions"[289] that are rendered by the International Court of Justice on requests from international organisations. Their binding force derives from a treaty provision, under which any dispute concerning the application of a treaty is to be solved by a reference to advisory proceedings. Furthermore, parties to such a treaty undertake to act in conformity with a rendered opinion and recognise it as binding. This system has

283 Hudson M., *Effect of Advisory Opinions of the World Court*, 42 AJIL 630 (1948).
284 Aljaghoub M.M., *The Advisory Function of the International Court of Justice*, Springer 2006, p. 121.
285 Ago R., *"Binding" Advisory Opinions of the International Court of Justice*, 85 AJIL 439, 440 (July 1991).
286 *Ibid.*, p. 441.
287 *Western Sahara*, Advisory Opinion, 1975 ICJ Rep. 12, (Judge De Castro, sep. op.), p. 138.
288 Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, p. 855.
289 Rosenne Sh., *supra* fn. 1, p. 1639.

been expressly acknowledged and confirmed by the International Court of Justice which has already issued some advisory opinions to such effect. In *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* advisory opinion, the ICJ observed that the inclusion of this mechanism in treaties:

> in no way affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself. Accordingly, the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with.[290]

The inclusion of the compulsive advisory opinion mechanism is predominantly utilised in multilateral agreements between States and international organisations and aims at overcoming jurisdictional limitations of the Court in relation to international organisations.[291] A relevant clause was firstly contained in the UN Privileges Convention in Article 30:[292] later, it was adopted among others in the Specialised Agencies Privileges Convention,[293] the International Atomic Energy Agency Privileges Convention,[294] the UN Headquarters Agreement,[295] the UN Narcotic Drugs Convention,[296] and the Vienna Convention on the Law of Treaties between States and International Organizations[297] not yet in force.

Having all these considerations in mind, State practice relating to the implementation of advisory opinions rendered by the International Court of Justice through national judicial organs is now presented. The first case concerns Param Cumaraswamy, a Malaysian jurist and a Special Rapporteur on the Independence of Judges and Lawyers of the UN Commission on Human Rights appointed

290 *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, 1956 ICJ Rep. 77, p. 84.

291 *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, 1956 ICJ Rep. 77, p. 85: "The special feature of this procedure is that advisory proceedings take the place of contentious proceedings which would not be possible under the Statute of the Court".

292 *Convention on the Privileges and Immunities of the United Nations*, New York, 13 February 1946, 1 UNTS 15 [*UN Privileges Convention*].

293 *Convention on the Privileges and Immunities of the Specialised Agencies*, New York, 21 November 1947, 33 UNTS 261, Sec. 32.

294 *Agreement on the Privileges and Immunities of the International Atomic Energy Agency*, 1 July 1959, 374 UNTS 147, Article X, Sec. 34.

295 *Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations*, New York, 26 June 1947, 11 UNTS 11, Sec. 21.

296 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, Vienna, 1582 UNTS 95, Article 32(3).

297 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, Vienna, 20 March 1986, UN Doc. A/CONF.129/15, Article 66(2).

in March 1994.[298] In November 1995, he gave an interview to a magazine *International Commercial Litigation* that later was used in the formation of an article on the Malaysian judiciary. In the interview, Cumaraswamy referred to particular litigations being heard before Malaysian courts. Subsequently, two Malaysian companies filed a suit against him asserting that the article was defamatory and requesting an award of damages in the amount of approximately US$12 million each, including "exemplary damages for slander". From the beginning of the controversy, the United Nations through the UN Secretary-General was of the position that the words of Cumaraswamy were expressed in his official capacity and, thus, that he was entitled to immunity from the legal process in Malaysian courts. A relevant certificate was issued. It was not, however, transferred to competent domestic judicial organs by the government of Malaysia. Malaysian courts did not recognise Cumaraswamy's immunity as he was considered to be neither a sovereign nor a diplomat, but an "unpaid, part-time provider of information".[299] The Special Rapporteur exhausted all available remedies under Malaysian law relating to the matter of immunity in national proceedings[300] and he was already facing four defamation suits to be considered in full trials, together amounting to US$70 million.[301]

As differences about the status of Cumaraswamy between the United Nations and Malaysia were not settled via diplomatic means, both parties concerned agreed to utilise the compulsive advisory opinion mechanism and to refer the controversy to the International Court of Justice. On this basis, the UN Economic and Social Council requested the Court[302] to decide whether Article VI, Section 22 of the UN Privileges Convention was applicable to the Special Rapporteur[303] and what the legal obligations of Malaysia were in this regard. The Court delivered its opinion on 29 April 1999. It declared by overwhelming majority (14 votes to 1) that Cumaraswamy acting in his official capacity as a Special Rapporteur was entitled

298 UN Commission on Human Rights, *Resolution 1994/41. Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, 4 March 1994, UN Doc. E/CN.4/1994/132.

299 UN ECOSOC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy. Addendum. Recent Developments in Malaysia*, 25 March 1998, UN Doc. E/CN.4/1998/39/Add.5, ¶ 3; *Immunity of a Special Rapporteur Opinion*, ¶ 13.

300 E.g.: *MBf Capital Ghd and Another v. Dato' Param Cumaraswamy*, Malaysia, High Court, 28 June 1997, 121 ILR 368; and *MBf Capital Ghd and Another v. Dato' Param Cumaraswamy*, Malaysia, Court of Appeal, 20 October 1997, 121 ILR 382.

301 UN ECOSOC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy. Addendum. Recent Developments in Malaysia*, 25 March 1998, UN Doc. E/CN.4/1998/39/Add.5, ¶ 6.

302 UN ECOSOC, *Resolution 1998/297. Request for an Advisory Opinion of the International Court of Justice*, 5 August 1998, UN Doc. E/1998/98.

303 "Experts … performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions … In particular they shall be accorded: … (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind".

to immunity on the basis of the UN Privileges Convention and that this immunity extended to legal process of every kind for the words spoken by him during the interview for the magazine *International Commercial Litigation*. Further, the obligation of the government of Malaysia to inform its courts about the determination of the UN Secretary General in relation to the immunity of the Special Rapporteur as well as to communicate the *Immunity of a Special Rapporteur Opinion* to Malaysian judicial organs was stressed. Finally, the ICJ explained that the question of immunity from legal process should be perceived as "a preliminary issue to be expeditiously decided *in lime litis*" and that Cumaraswamy should be held financially harmless for any costs imposed by courts in Malaysia.[304]

Once the opinion was delivered by the International Court of Justice, the UN Economic and Social Council adopted a resolution in which it highlighted the legal obligation of Malaysia to give effect to this opinion by taking note "of a stated commitment by the Government of Malaysia to abide by the advisory opinion" and by stressing

> the obligation of Malaysia as a State party to the Convention on the Privileges and Immunities of the United Nations to make further efforts, in order that its international obligations thereunder be given effect … in accordance with the advisory opinion of the International Court of Justice.[305]

Cumaraswamy on his part applied to the High Court of Malaysia to strike out one of the defamation suits lodged against him. Nevertheless, the Court decided on 18 October 1999 that the ICJ decision is not binding on the High Court and dismissed the application, consequently leaving the matter to be decided at a full trial.[306] Despite certain hesitation, Malaysian courts "grudgingly" gave effect to the *Special Reporter Opinion* by setting aside cases against Mr Cumaraswamy.[307] According to the Malaya High Court, there was an obligation to implement the ICJ decision in the domestic legal system of Malaysia:

> [w]hilst this court might disagree with certain aspects of the decision of the ICJ, the decisive acceptance of the ICJ's ruling by the parties will in my view prevail in respect of this case because the parties had specifically agreed to

304 *Immunity of a Special Rapporteur Opinion*, ¶ 67.

305 UN ECOSOC, *Applicability of the Convention on the Privileges and Immunities of the United Nations in the Case of Dato' Param Cumaraswamy as a Special Repporteur of the Commission on Human Rights on the Independence of Judges and Lawyers*, 30 July 1999, UN Doc. E/1999/99.

306 Duxbury A., *The Privileges and Immunities of United Nations' Experts: The Cumaraswamy Case*, 2 Asia-Pacific J. on Human Rights and the Law 88, 106 (2000); *Param's Application Dismissed with Costs*, New Straits Times, Tuesday, 19 October 1999; UN Commission on Human Rights, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *Mr. Param Cumaraswamy*, 21 February 2000, UN Doc. E/CN.4/2000/61, ¶ 199.

307 Shuaib F.S., *The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse?*, 16 International Islamic University Malaysia LJ 181, 200 (2008).

> refer this case for an advisory opinion from the ICJ … I can therefore only express my views; but I am bound to give binding effect to the advisory opinion in this case.[308]

Consequently, on 7 July 2001, the Kuala Lumpur High Court dismissed the remaining civil suits lodged against the Special Rapporteur on the grounds that he enjoyed immunity from legal process in accordance with the advisory opinion of the International Court of Justice. By doing so, "the Government of Malaysia has thus discharged its responsibilities in accordance with the ICJ opinion".[309]

Another interesting example of the implementation of advisory opinions through domestic judicial decisions relates to the *Construction of a Wall Opinion* delivered on 9 July 2004. The ICJ concluded in this opinion that the construction of the wall by Israel in the Occupied Palestinian Territory was not in conformity with international law. Furthermore, on the basis of the opinion, Israel was found to be obligated to dismantle the structure of the wall, to cease any additional work on the wall, and to make reparation for all damage caused by the construction of the wall.[310] The *Construction of a Wall Opinion* served petitioners, residents of Palestinian villages surrounded by the Israeli fence in the Alfei Menashe enclave, to bring their lawsuit to the Supreme Court of Israel sitting as the High Court of Justice. They requested that the fence barrier be demolished as not legal under international law. In its opinion in the *Mara'abe case*,[311] the court at unprecedented length (21 pages out of 64) discussed in detail the *Construction of a Wall Opinion* together with its effects and conclusions both in law and facts.

On this basis, it determined that:

> the Supreme Court of Israel shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion. However, the ICJ's conclusion, based upon a factual basis different than the one before us, is not *res judicata*, and does not obligate the Supreme Court of Israel to rule that each and every segment of the fence

308 *Insas Bhd & Another v. Dato' Param Cumaraswamy*, Malaysia, High Court, 7 July 2000, 121 ILR 464, 470–1; UN ECOSOC, *Letter Dated 24 July 2000 from the Secretary-General to the President of the Economic and Social Council*, 24 July 2000, UN Doc. E/2000/105.

Interestingly, the Malaysian High Court in *Insas Bhd & Another v. Dato' Param Cumaraswamy* as a dictum expressed the view that "[w]hilst it is well within the purview of the question posed, for the ICJ to rule as it did that 'the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided in *limine litis*', by the same token the ICJ ought to have then remitted that question to the Malaysia court to decide". It seems that the Malaysian court opts for more integrated and engaged interjudicial dialogue not only of the jurisprudential dimension, but also procedural.

309 UN ECOSOC, *Letter Dated 26 April 2002 from the Secretary-General to the President of the Economic and Social Council*, 29 April 2002, UN Doc. E/2002/51.

310 *Construction of a Wall Opinion*, ¶ 163(3)(A)–(C).

311 *Mara'abe v. Prime Minister of Israel*, Supreme Court, Israel, 15 September 2005, Case no. HCJ 7957/04 [*Mara'abe case*].

> violates international law. The Israeli Court shall continue to examine each of the segments of the fence, as they are brought for its decision and according to its customary model of proceedings.[312]

In fact, the Israeli court did not find that the fence around the Alfei Menashe enclave was built in accordance with international law and ordered the alteration of the wall route as to accommodate the rights of local residents of Palestinian origins.[313] Thus, it may be argued that the *Construction of a Wall Opinion* was at least partially implemented, as "the Israeli Court critiques only the ICJ's evaluation of the factual basis".[314]

Finally, the Constitutional Court of Kosovo carried out an extraordinary case of implementation of an advisory opinion of the International Court of Justice by a municipal court, as the issues discussed and decided upon by the World Court were of the greatest importance to the existence of the State and pertaining to its independence and sovereignty. The *Kosovo Independence Opinion* concluded that

> the adoption of the declaration of independence [of Kosovo] of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law.

Against this background, a case was referred to the Constitutional Court of Kosovo by the Privatization Agency of Kosovo against the judgment of the Appellate Panel of the Special Chamber of the Supreme Court. The Appellate Panel in short rejected the appeal on the basis that laws passed by the Assembly of Kosovo without approval of the Special Representative of the UN Secretary-General, as required by the UN Security Council Resolution 1244[315] and relevant regulation of the UN Interim Administration Mission in Kosovo and pertaining to the creation of the Agency and its operation, were not applicable in Kosovo. The Constitutional Court invalidated the decision of the Appellate Panel (composed of international judges) and observed:

> In these circumstances, the Court can only draw the conclusion that the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo does not recognize and apply the laws lawfully adopted by the Assembly. In fact, the Special Chamber simply continues to ignore the existence of Kosovo as an independent State and its legislation emanating from its Assembly.

312 *Mara'abe case*, ¶ 74. The detailed discussion of the difference in approach to the dispute is presented in Section 3.4.

313 *Mara'abe case*, ¶ 116.

314 Fikfak V., *supra* fn. 109, p. 17.

315 UN Security Council, *Resolution 1244 (1999). Kosovo*, 10 June 1999, UN Doc. S/RES/1244 (1999).

> In this connection, the Court refers to the Advisory Opinion of the International Court of Justice of 22 July 2010, according to which the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council Resolution 1244(1999) or the Constitutional Framework. In the Court's view, the establishment of the Republic of Kosovo as an independent and sovereign state, based on the declaration of independence and whose statehood was recognized, so far, by 75 countries, is, therefore, not contrary to Security Council Resolution 1244(1999) as well as international law, the principles of which the Republic of Kosovo has to abide by, as laid down in Article 16(3) of the Constitution, providing that "The Republic of Kosovo shall respect international law."[316]

2.3 Municipal courts as enforcers – a general overlook

Current national judicial practice relating to the enforcement of decisions and opinions of the International Court of Justice is still rather scarce, and presented case-law is illustrative, but not decisive. Nevertheless, some general conclusions are already warranted. Discussed domestic rulings indicate that national adjudicators generally perceive themselves as State organs from the international legal perspective. As such, they acknowledge in principle their obligation to comply with international law and international decisions and show some degree of willingness to address enforcement and compliance as a legal problem. Although the US Supreme Court in its *Medellin* decision preferred to recognise the enforcement of ICJ decisions as a matter belonging to the political branch and pointed to the Executive as being under the obligation to address the judgment of the World Court, the jurisprudence of American states and lower federal courts implies that those courts are more prompt and more willing to give deference to ICJ decisions than higher federal courts.[317] This approach of the highest courts and constitutional tribunals might be attributed to the fact that they operate in a highly politicalised environment and are in fact involved to some extent in public policy making and implementation. Furthermore, the negative attitude to decisions of the International Court of Justice on the part of some American judicial institutions is not to be attributed only to political considerations deeply rooted in the American perspective on international law,[318] but to some extent also to the

316 *Kosovo Privatization Agency*, Constitutional Court, Kosovo, 31 March 2011, Case no. Kl 25/10, ILDC 1606 (KO 2011).

317 Bradley C., Damrosch L.F., Flaherty M., *supra* fn. 56, p. 667: "The Oklahoma state court was able to enforce *Avena* without congressional action, but it also did not need these elaborate arguments about *res judicata* or anything else. It simply decided under its own procedures to allow for review and reconsideration. There is every reason in my mind to think that the state courts would be an appropriate place to pursue the claims under the Vienna Convention, and they will, I think in large part, probably try to accommodate such claims".

318 Anne-Marie Slaughter summarised this attitude in the following words: "American international lawyers link international law to international politics, international economics and international

misunderstanding of this international law itself. The main argument presented by the US Supreme Court in the *Medellin case* against domestic enforcement was that the enforcement mechanism through the UN Security Council under Article 94(2) of the UN Charter is "the sole remedy for noncompliance".[319] This statement is incorrect, as proven at the beginning of this chapter. States are entitled to employ all possible channels of enforcement of ICJ decisions, also through domestic courts, as there is no international legal norm that may hinder or limit this right. Similarly, private parties may seek to do so. Article 94(2) of the UN Charter shall only be consequently construed as a competency norm that implicitly provides for an active role of the UN Security Council in the post-adjudicative phase of a dispute settlement by the principal judicial organ of the United Nations.

For some domestic judicial organs, Article 94(1) of the UN Charter requiring compliance forms a legal basis to give effect to decisions of the International Court of Justice. This obligation is further strengthened by the international law-friendly attitude of national constitutions of the most of the world's States. Of particular relevance are the constitutional provisions governing the status of international law in domestic legal orders and regulating the implementation of international obligations that guide national judges in their role as enforcers of international judicial decisions. It is so even despite the fact that no constitutional rule pertaining explicitly to decisions of international tribunals has been identified.

This simple approach contributes to the general understanding of the role of national courts in enforcing international judicial decisions. Any municipal court confronted with a motion seeking the enforcement of an ICJ pronouncement, either *sensu largo* or *sensu stricto* or even *quasi*-enforcement, faces in fact two distinct but similarly important legal questions from the interface between constitutional and international law. The first one, more important from the individual's perspective, is whether ICJ decisions and opinions create individually enforceable rights or causes of actions in domestic courts. In most jurisdictions the answer to this issue would be problematic or even negative, as there is hardly any domestic norm in this regard. Also, international law seems to be silent on the enforceability of ICJ decisions in municipal judicial institutions. But there is the second question, probably even more significant, as it may overcome the negative outcome of the first inquiry. It looks on the problem from the State's perspective and asks whether ICJ decisions are binding on State organs – including courts – without any

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morality", *see*: Slaughter A.-M., *A Dangerous Myth*, Prospect Magazine, February 2004, available at: http://www.prospectmagazine.co.uk/opinions/adangerousmyth (25.02.2015). Andreas Paulus expressed the same opinion in stronger words: "Another explanation refers to the unique democratic experience of the US, which is hostile to foreign judges, even to those in Washington, D.C. By their very nature, international legal institutions are not under the same democratic constraints as elected local judges. Populist democracy and a strong regionalism seem not to be compatible with the transfer of broad powers to unelected international judicial institutions, be it the ICJ, the WTO dispute settlement body, or the ICC", Paulus A.L., *From Neglect to Defiance? The United States and International Adjudication*, 15 EJIL 783, 810 (2004).

319 *Medellin case*, at 510.

further measures of implementation by virtue of Article 94(1) of the UN Charter. If a municipal court answers the latter question affirmatively, then it is compelled to respect and to comply with a decision of the International Court of Justice, regardless of whether individuals have private causes of actions to enforce it. This matter is, unsurprisingly, regulated by the constitutional law of each State and is probably even broader as referring to the role and status of international law, and treaty law in particular, in a domestic legal system. Many constitutions provide for an international law-friendly clause, and some even grant special status to treaty provisions dully ratified. In this context, it is more likely that municipal courts will be willing to follow the International Court of Justice and give effect to its pronouncements.

But the enforcement of ICJ decisions in and by municipal courts is a unique phenomenon that has its own limitations as well as certain legal challenges that normally do not appear in regular national enforcement proceedings. These issues relate to the *res judicata* principle of national judicial decisions, judicial independence in relation to pronouncements of international adjudicators, the interplay between the obligation to comply and "overriding constitutional dictates"[320] that may prevent such enforcement,[321] and, finally, the question of the non-self-executing character of certain international norms. All of them have already been addressed with different results by municipal courts in their case-law presented in this chapter.

Finally, the examined judicial practice clearly indicates that national courts do not treat the International Court of Justice merely as an institution of diplomacy or international politics, even if they do not agree with certain conclusions reached by the ICJ. In the presented cases "there is no discussion or doubts expressed as to whether the ICJ's rulings constitute 'law' or indeed whether the ICJ is a court".[322] Therefore, national judicial institutions do recognise and accept the International Court of Justice as a court of law, although established to administrate a different body of law. Furthermore, none of the domestic courts whose decisions have been analysed above has directly challenged the ICJ interpretation of international law. Their hesitation, at least of some of them, is linked rather with domestic legal issues like the status of ICJ decisions, procedural limitations and bars, and constitutional considerations as well as the factual background.

320 Gattini A., *supra* fn. 22, p. 1169.

321 "In general terms, a domestic judge … might accept the judgment subject to a limited review on grounds specific to that nation's constitution, such as due process", *see*: Reilly D.M., Ordonez S., *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 New York University JIL and Politics 435, 449 (1995–6); and "the experience in Europe has been that national courts reserve the power to reject the application of norms promulgated by regional and international judicial authorities and legislative bodies in those instances where the norms were perceived to violate core domestic constitutional principles", *see*: Shany Y., *An Old House with New Bricks or a New House of Old Cards? On National Courts, the International Rule of Law and the Power of Legal Imagination*, 4 Jerusalem Review of Legal Studies 50, 61 (2012).

322 Fikfak V., *supra* fn. 109, p. 18.

3 Reception of decisions of the ICJ by municipal courts

The enforcement of decisions of the International Court of Justice through and by municipal courts has been discussed in the previous chapter. Yet, the inter-judicial dialogue existent between the Court and domestic adjudicators also takes the form of the reception of the jurisprudence of the former by its municipal counterparts. Unlike enforcement, reception is not aimed at securing any ICJ decision benefit for a judgment-creditor State or an interested third party, but rather concentrates on supporting the reasoning of national courts in cases with an international dimension or their fact-finding function in relation to disputes already decided by the ICJ. For Gattini, reception shall be perceived as a use by a national court of international court findings as an authoritative interpretation of the content of an international norm.[1] Therefore, it differs significantly from enforcement, as it assumes and supposes a considerable dose of voluntariness and, in fact, provides more space for a meaningful and committed inter-judicial dialogue. In this context, the conclusion of Bedjaoui proves to be particularly accurate. He noted that "[e]nforcement signifies the implementation of the judicial decision as an *instrumentum*, i.e., in terms of its formal entirety. The reception we are talking of looks at the judicial decision as a *negotium*, i.e., in terms of its substantive content".[2]

Additionally, Nollkaemper observes that one of the functions of national courts in relation to international tribunals and their decisions is the normative development of international law.[3] National adjudicators assist in the "stabilization of normative expectations" by exercising their judicial functions in international cases by acknowledging in their jurisprudence the influence of international courts in interpreting and developing international law. This support and recognition

1 Gattini A., *Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes* [in:] *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, eds. Fastenrath U., et al., Oxford University Press 2011, pp. 1170–1. Bedjaoui proposes an even less complex understanding of the judicial reception as a reference by a national court to an international judicial decision in connection with a dispute refereed to it, *see*: Bedjaoui M., *The Reception by National Courts of Decisions of International Tribunals*, 28 NYUJILP 45, 47 (1996–6).

2 Bedjaoui M., *ibid.*, p. 56.

3 Nollkaemper A., *Conversations among Courts: Domestic and International Adjudicators*, ACIL Research Paper 2013–08, p. 17.

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largely influence the effectiveness of international rulings not (only) as a definitive settlement of a particular inter-State dispute, but also contribute to a wider efficacy of a normative aspect of each decision that clarifies, updates, and examines norms of international legal systems.

This chapter and the scrutiny of national jurisprudence referring to and receiving decisions of the International Court of Justice clearly and firmly describe and confirm that indeed both the ICJ and its domestic counterparts are involved in inter-judicial dialogue. Municipal courts seem to be willing to recognise the normative value and legal importance of decisions of the World Court in determining of the contents of international law, even though such decisions may not be binding on their respective States and them themselves.[4] What is more, the openness of the World Court towards municipal judicial institutions and their rulings has resulted in the increase of reception of its decisions by domestic adjudicators.

This chapter is dedicated to describing, analysing, and providing certain conclusions in relation to the phenomenon of the reception of decisions of the International Court of Justice by municipal courts. Firstly, the empirical and statistical data on national case-law referring to the jurisprudence of the ICJ are presented. Next, a typology of the purposes and aims of the judicial reception is proposed and described. A detailed examination of the collected domestic decisions follows the classification. Additionally, instances when national court distinguish between conclusions as to the law and facts reached by the ICJ in its rulings and cases considered at national level are scrutinised. Moreover, in certain situations, municipal judicial institutions resolve to touch upon the status or the role of international jurisprudence in national legal systems. Their opinions will likewise be presented.

Nevertheless, at first, some remarks concerning the methodological aspects need to be made. The present author is aware of significant limitations, both subjective and objective in nature, that have impacted the collected material of national judicial decisions. One needs to acknowledge that it is impossible to identify all decisions of municipal courts containing a meaningful reference to rulings of the International Court of Justice for many reasons. Firstly, the practice of judicial case reporting or even recording in writing is not widespread, particularly in non-common law systems. Next, the digitalisation of courts' decisions is even less frequent, which makes researching national jurisprudence unmanageable for many scholars. Thirdly, any identification and selection process is based upon available research tools. For this study, certain national and international case-law databases, indexes, and reports have been scrutinised that are themselves not exhaustive. Fourthly, the "intensity" of judicial reception differs from jurisdiction to jurisdiction and is a function of the openness of the justice system to international law. For example, Nollkaemper points out that the judicial practice in Asia in relation to international

4 Reilly D.M., Ordonez S., *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 New York University JIL and Politics 435, 469 (1995–6).

law is very scarce,[5] not to mention its reporting. Finally, it is self-evident that the linguistic skills of a researcher are of the highest importance in the process of the identification and selection of national judicial decisions.

Therefore, this chapter is not and should not be considered as exhaustive on the subject of the reception of the jurisprudence of the ICJ by national adjudicators. Notwithstanding, the collected material of national judicial decisions is rather remarkable, both from the qualitative and quantitative perspective, and representative of the phenomenon. Its extent has exceeded expectations anticipated at the commencement of the research. Furthermore, on this basis, some representational and comprehensive conclusions pertaining to the reception and its practice may be drawn.

As to the details of the identification, selection, and examination process of municipal judicial decisions, it consisted of three phases. During the first phase, selected databases, indexes, and reporters of national case-law were screened for any reference to the International Court of Justice. Secondly, the preselected sample was examined as to exclude decisions immaterial from the formal point of view. Consequently, rulings with references to separate or dissenting opinions or declarations of ICJ judges, to documents other than decisions of the World Court (like the ICJ Statute, the UN Charter, or the ICJ Rules), and to statements, positions, or briefs of the parties before the Courts were excluded. The same was done in relation to non-majority decisions of municipal courts. At the third stage, the selected material was scrutinised in detail and identified examples of the reception of the jurisprudence of the International Court of Justice selected, analysed, and categorised.

After a close examination of collected national judicial decisions and rejections of about 160 rulings, 224 municipal rulings in total were identified as examples of the reception of the jurisprudence of the International Court of Justice at domestic levels. These judicial pronouncements come from 37 different jurisdictions: 35 national jurisdictions[6] and 2 jurisdictions of non-universally recognised self-governed entities. The distribution of identified domestic decisions among these jurisdictions as well as a list of them is presented in Table 3.1.

Not surprisingly, 152 municipal judicial decisions originate from common-law systems covering 10 different jurisdictions,[7] which amounts to 67.9% of all

5 Nollkaemper A., *supra* fn. 3, p. 10.

6 The United Kingdom and the United States of America are considered as single jurisdictions, although they in fact consist of several inner jurisdictions. In relation to the United Kingdom, this includes Scottish and English (applicable also in Wales) as well as general, British jurisdictions (House of Lords and Privy Council). Decisions from the US include federal jurisdictions and state jurisdictions: California, Massachusetts, New York, Oklahoma, Texas, and Virginia.

7 Australia, Canada, China-Hong Kong, India, Israel, New Zealand, Singapore, South Africa, the United Kingdom, and the United States.

Table 3.1 Municipal judicial decisions referring to the case-law of the ICJ, by jurisdiction

Domestic jurisdiction	*Number of identified municipal judicial decisions*	*Percentage of all judicial decision identified*
Albania	1	0.4%
Argentina	1	0.4%
Australia	11	4.9%
Belgium	1	0.4%
Canada	8	3.6%
China – Hong Kong	2	0.9%
Colombia	4	1.8%
France	3	1.3%
Germany	11	4.9%
Greece	1	0.4%
Hungary	1	0.4%
India	3	1.3%
Iran	1	0.4%
Israel	6	2.7%
Italy	11	4.9%
Japan	1	0.4%
Kenya	1	0.4%
Latvia	2	1.0%
Morocco	3	1.3%
Namibia	1	0.4%
Netherlands	7	3.1%
New Zealand	8	3.6%
Nigeria	1	0.4%
Norway	2	1.3%
Peru	1	0.4%
Philippines	1	0.4%
Poland	5	2.2%
Sierra Leone	1	0.4%
Singapore	3	1.3%
Slovenia	1	0.4%
South Africa	12	5.4%
Spain	4	1.8%
Switzerland	4	1.8%
United Kingdom	32	14.3%
Scotland	*1*	
United States	67	29.9%
California	*3*	
Massachusetts	*1*	
New York	*2*	
Oklahoma	*1*	
Texas	*2*	
Virginia	*1*	
Kosovo	1	0.4%
Turkish Cyprus	1	0.4%
	224	

rulings discussed and 27% of the total number of jurisdictions identified. The civil law regimes are represented by 63 judicial decisions (28.1%) rendered within 20 jurisdictions[8] (54.1%). Finally, nine pronouncements (4%) come from mixed or pluralistic systems within seven jurisdictions[9] (18.9%). Doubtlessly, common-law regimes are overrepresented in the scrutinised pool, which may be, however, attributed to a certain extent to objective premises. Due to their internal structure and characteristics rooted in the *stare decisis* principle, these jurisdictions have developed extensive case reporting practices, which facilitates availability. Furthermore, the vast majority of common-law jurisdictions use the English language as their official language and, consequently, municipal judicial decisions may be accessed, comprehended, and researched easily. Finally, referring to or citing judicial authorities is a common feature of common-law judicial decisions, either national or foreign or even international.

Turning now to the judicial institutions involved in the process of reception of decisions of the World Court at the national level, 224 identified municipal rulings have been issued by 103 different courts in 37 jurisdictions. These include courts of general jurisdiction: 22 first instance, 30 appellate and superior, and 30 highest courts of last resort; as well as specialised courts, including 10 constitutional judicial bodies, 4 administrative tribunals of different levels, 3 quasi-judicial bodies with prerogatives to review administrative actions, and 4 other specialised courts.

As far as the geographic distribution of collected cases is concerned, all six continents are represented in the pool. Figures 3.1 and 3.2 illustrate the distribution by continents of all identified judicial decisions and jurisdictions respectively. Nevertheless, it is clear from the data presented that Europe and North America are overrepresented in the sample. As previously, the main cause of this phenomenon may be associated with the fact that judicial rulings from Africa, Asia, and South America are either rarely reported or not typically available in English.

Furthermore, Figure 3.3 presents the number of identified municipal courts' decisions referring to ICJ rulings by decades. No such case has been identified in the 1940s. In the three following decades, the number of municipal rulings mentioning the jurisprudence of the International Court of Justice was rather low: ten in the 1950s, eight in the 1960s, and four in the 1970s. There was a slight increase in the 1980s with 25 identified decisions, but this trend was not maintained in the 1990s with only 12 domestic pronouncements identified. This might lead to the conclusion that the phenomenon of municipal courts' reception of International Court of Justice reasoning and conclusions was rather marginal. Nevertheless, taking into account the most recent decades such a supposition is not still valid today, as municipal adjudicators have begun to acknowledge the jurisprudence of the World Court and its profound importance in domestic fora. In the 2000s alone 115 instances of the reception of decisions of the ICJ by municipal courts in

8 Albania, Argentina, Belgium, Colombia, France, Germany, Greece, Hungary, Italy, Japan, Latvia, the Netherlands, Norway, Peru, Poland, Slovenia, Spain, Switzerland, Kosovo, and Turkish Cyprus.

9 Iran, Kenya, Morocco, Namibia, Nigeria, the Philippines, and Sierra Leone.

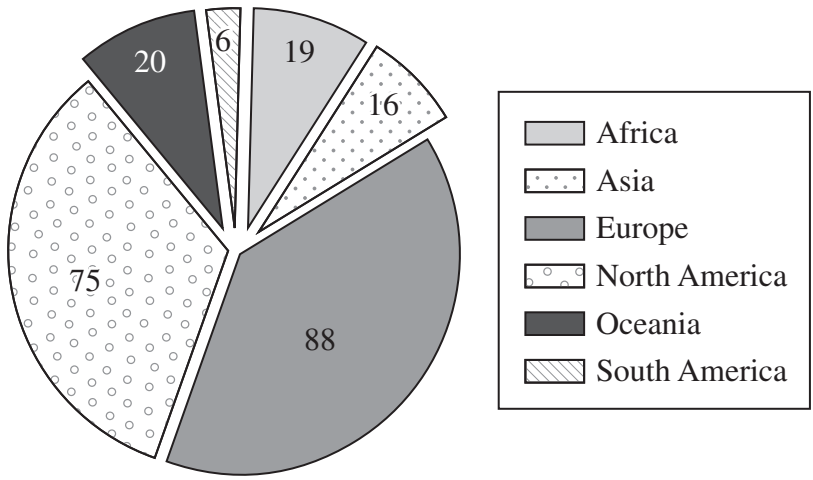

Figure 3.1 Identified municipal judicial decisions, by continent.

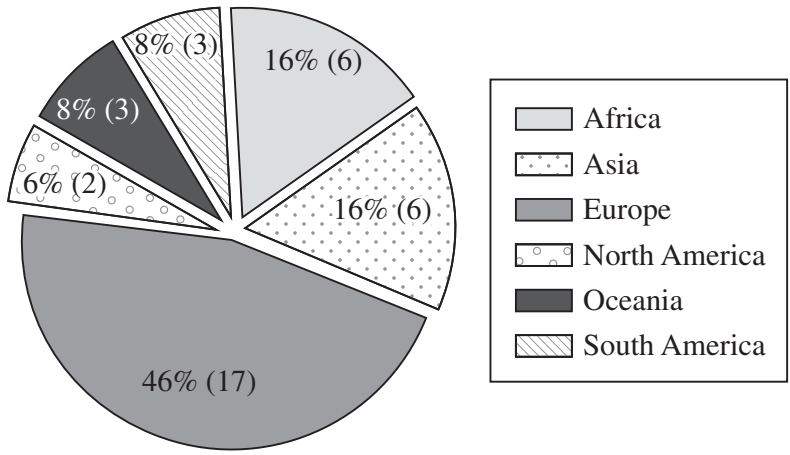

Figure 3.2 Identified jurisdictions with rulings referring to the case-law of the ICJ, by continent.

their pronouncements have been identified during the course of the study with an additional 50 cases starting from 2010. Whether this tendency will last is currently difficult to predict, but it is symptomatic that the number of municipal decisions in the years since 2010 is already higher than in any decade between 1950 and 1999. This trend may be an indicator of a more profound change in relation to the

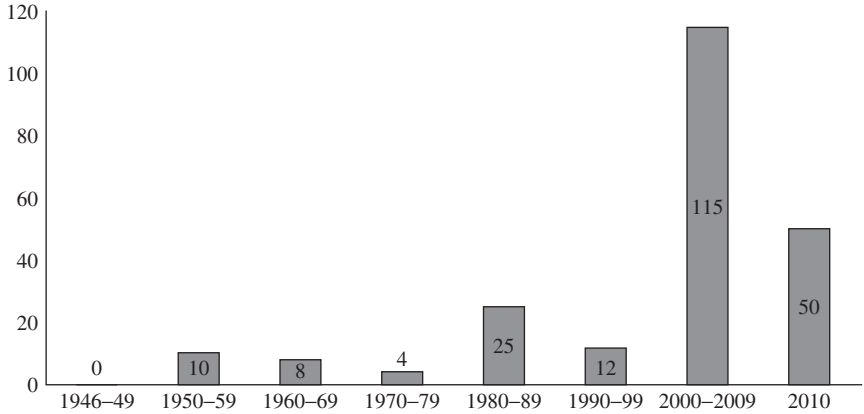

Figure 3.3 Identified municipal judicial decisions, by decade.

jurisprudence of the International Court of Justice and its reception by domestic courts.

Additionally, data from Figure 1.3 presented in Chapter 1 pertaining to the total number of cases in which the ICJ rendered decisions discussing municipal rulings by decade are juxtaposed with the distribution of identified domestic decisions by decades in Figure 3.4. It clearly shows that, firstly, the more cases are decided by the International Court of Justice, the more municipal courts

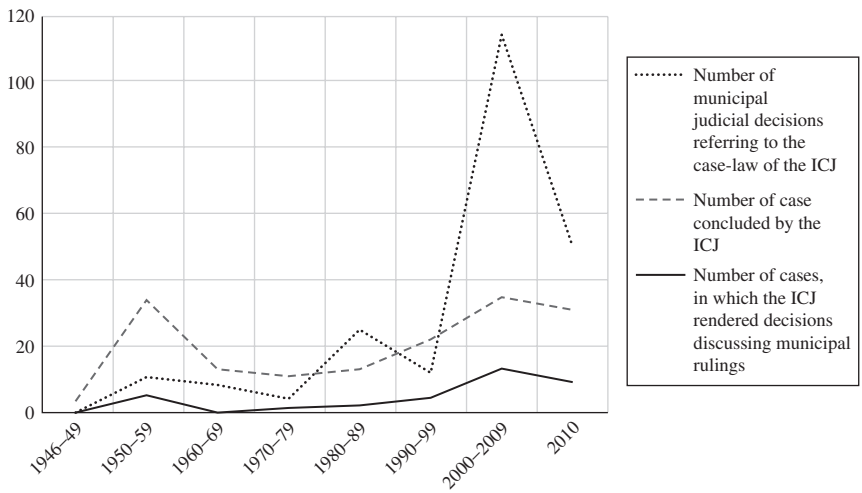

Figure 3.4 Municipal judicial decisions referring to the case-law of the ICJ and cases of the ICJ in which decisions discussing municipal rulings were rendered, by decade.

discuss its jurisprudence and refer to it in their decisions. Secondly, a correlation exists between the number of decisions of the ICJ in which domestic rulings are discussed, and the number of national judicial pronouncements referring to or discussing the World Court's decisions. Finally, starting with the beginning of the decade of the 2000s, both the International Court of Justice and municipal courts are more willing to engage actively in inter-judicial dialogue with each other.

Turning now from the quantitative to the qualitative dimension of the reception of the jurisprudence of the International Court of Justice within the national judicial decision-making process, the reference by municipal courts to the case-law of the ICJ is predominantly normative in nature. First and foremost, domestic courts utilised international case-law to establish and confirm the contents of international norms. Consequently, decisions of the World Court serve as authoritative evidence of international law (177 identified instances), primarily that of customary character. Despite this general observation, in some circumstances it might even be argued that certain decisions of the ICJ are considered by its municipal counterparts as a primary source of reference pertaining to the scope and contents of international law. This is particularly visible when references to or citations of international rulings are considered as exclusive bases for a determination in relation to international law in domestic proceedings. In addition, rulings of the World Court are received within domestic judicial systems as authoritative treaty interpretations (41 identified instances). Then, decisions of the Court influence national judges' perception of international law, its characteristics, nature, and practice. They provide guidelines for national courts in a highly uncodified field of sources of international obligations and explain their interrelations and interdependencies (41 instances). Finally, in a limited number of instances the jurisprudence of the International Court of Justice is looked upon to provide a rationale and a sound justification for the creation of

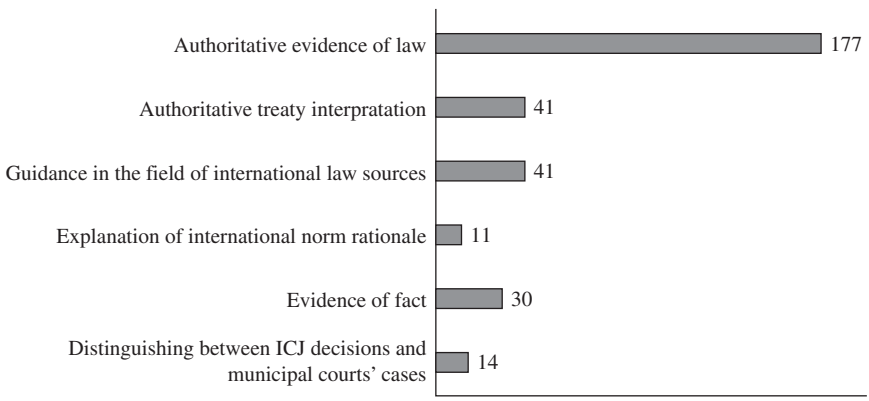

Figure 3.5 Types of reference to the case-law of the ICJ in identified municipal rulings.

international rules (11 instances) and, thus, facilitates the teleological interpretation of the latter.

Besides this main, normative character of the inter-judicial dialogue between the International Court of Justice and municipal courts, the process of the reception of decisions of the ICJ within domestic jurisprudences has yet another aspect. While resolving an inter-State dispute, the World Court is called upon primarily to determine relevant facts, subsequently to assess their effect and result from the perspective of international law. These factual determinations are utilised by municipal adjudications in their proceedings without the need for carrying out evidentiary proceedings in this respect (30 instances). Furthermore, on 14 occasions domestic adjudicators expressed their need to distinguish a national case from an inter-State dispute settled by the ICJ, either on the basis of factual differences or legal considerations.

As the relevant data indicate, the reception is not a marginal phenomenon; nevertheless, domestic courts rarely discuss in their opinions the role and status of international decisions, and these of the International Court of Justice in particular, within the respective legal framework. Only 23 instances of such brief clarifications have been identified. They are presented in more detail on the following pages.

Another interesting aspect of the reception of the decisions of the ICJ by municipal courts is the existence of the multi-reference in relation to the jurisprudence of the World Court. This means referring to two or more rulings of the Court in a single national judicial decision or mentioning the same decision of the World Court, but for different reasons or in distinctive contexts, e.g. as authoritative evidence of international law and an authoritative treaty interpretation. Statistically, this multi-reference is not a rare phenomenon. It appears in almost 30% of all identified municipal judicial decisions representing examples of the reception of the jurisprudence of the Court (66 rulings out of 224). Consequently, the research confirms and emphasises that multi-reference is yet another sign of a systematic openness to external judicial decisions and inter-judicial dialogue rather than a negligible situation.

Finally, 103 national courts in their 224 rulings referred all together to 56 decisions of the World Court. These include 47 decisions (judgments and preliminary measures orders) rendered in contentious proceedings and 9 advisory opinions.

3.1 Questions of international law

The same distinction between questions of law and of fact proposed in Chapter 1 guides the presentation of the reception of ICJ decisions by municipal courts in their rulings. Again, such a method of introducing the identified domestic case-law resembles two fundamental and traditional functions of each court of law – whether international or domestic – law-determining and fact-finding. In this section, the former aspect of the reception of decisions of the World Court by national judges is scrutinised.

This law-determination is inscribed in the process of the reception of international decisions, and that of the International Court of Justice in particular.

> The question of the reception of the entire international judicial decision is in fact, for the national court, whether it should accept and adopt, on the one hand the *existence* of an international norm, and on the other its *interpretation*.[10]

Doubtlessly, these two facets of this phenomenon are reflected in the material analysed as first and foremost, identified rulings of domestic courts refer to decisions of the ICJ as evidence of international law. Then, they are consulted as authoritative treaty interpretations for municipal adjudicators. Thirdly, ICJ decisions provide a rationale behind international norms. Finally, they are perceived as guidelines in the field of sources of international law by municipal courts.

3.1.1 ICJ decisions as evidence of international law

Collected municipal judicial decisions mentioning the jurisprudence of the International Court of Justice unambiguously reveal that domestic adjudicators treat decisions of the World Court predominantly as evidence of international law and refer to them in search for a guideline and assistance in establishing the existence, scope, content, and validity of international norms. The judicial practice evidently emphasises that these decisions are recognised, explicitly or implicitly, as authoritative statements of customary international rules or general principles of international law.

In this context, it should be noted that municipal judicial institutions usually do not engage in distinguishing between customary rules or general principles of international law, although they constitute different formal sources of international law, as per Article 38(1)(b) and (c) of the ICJ Statute, and play diverse functions within the international legal regime. The customary rules of international law are the most fundamental and traditional sources of international law developed over centuries of international interactions between States. But the reference to general principles of law was inserted into the ICJ Statute in order to address and avoid the issue of *non liquet* that occurs when no directly applicable international rule exists in relation to a factual problem at hand. In such situations, judges can rely on general principles as fundaments of the international law regime.[11] This lack of distinction by municipal courts may be justified by the fact that most national constitutions differentiate only between treaties and other norms of international law. The former, when ratified, are provided with a special status within many national legal systems, while most

10 Bedjaoui M., *supra* fn. 1, p. 55.

11 Shaw M., *International Law*, 6th ed., Cambridge University Press 2008, pp. 98–9.

constitutions are silent as far as customary rules or general principles are concerned and treat them on an equal footing. Consequently, this section does not distinguish between general principles of law and customary international law in relation to discussed national case-law, as typically municipal courts do not follow such distinction themselves. Moreover, ICJ rulings are predominantly utilised by national judicial organs without any accompanying clarifications and explanations.

In any case, the US Court of Appeals in *Flores v. Southern Peru Copper Corporation* brilliantly described the nature of customary international law that in some way compels municipal courts to rely on and refer to decisions of the World Court:

> [c]ustomary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a "soft, indeterminate character" … that is subject to creative interpretation.[12]

Once this state of international customary law is recognised, it is not a surprise that "[t]he International Court … is the first source to which it may be expected that a national court will turn if it is called upon to determine a matter of customary international law".[13] Furthermore, the general approach to the jurisprudence of the International Court of Justice by municipal courts as assistance in deconstructing an international rule is well illustrated by *Restatement (Third) of Foreign Relations Law of the United States*. Its §103(2) states that "[i]n determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals".[14] This evidentiary value of ICJ decisions is similarly acknowledged not only by American courts, but also by adjudicators around the globe.

The docket of the International Court of Justice in the first place contains a substantive number of cases that have addressed inter-State disputes pertaining to the title to a territory and State boundaries, either land or maritime. The rendered decisions have laid down several remarkable and prominent principles governing those issues that, subsequently, have been received and applied by national

12 *Flores v. Southern Peru Copper Corporation*, 414 F.3d 233 (2d Cir. 2003) [*Flores case*].

13 Higgins R., *National Courts and the International Court of Justice* [in:] *The Transformation of the Law. A Liber Amicorum for Lord Bingham*, eds. Andenas M., Fairgrieve D., Oxford University Press 2009, p. 406.

14 American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States*, American Law Institute Publishers 1987, p. 36.

judges. The first dispute considered by the Court after its establishment related to the controversy between the United Kingdom and Albania in the *Corfu Channel case*. The New Zealand Court of Appeal[15] on its basis emphasised that every State has "exclusive territorial control" within its borders and upon their crossing, any person or property fall within the jurisdiction of that State. Similarly, the Nigerian High Court repeated after the Court that "respect for internal boundaries is an essential foundation for international stability".[16] Within the setting of the Hungary–Slovakia dispute,[17] the ICJ expressed the principle of the inviolability of border and territorial treaties in the process of the succession of States. This rule, finding its codified manifestation in Article 12 of the *Succession of States Convention*,[18] is considered to be of customary character by the World Court, which the Slovenian Constitutional Court adopted in its judgment.[19]

The *Western Sahara Opinion*[20] was looked upon by the Supreme Court of Appeal of South Africa[21] to identify and apply a legal principle concerning land acquisition by occupation. The ICJ concluded that an inhabitation by nomadic people organised in polities in a defined territory renders such a territory incapable of being categorised as *terra nullius*. Consequently, it could not be acquired by occupation, and the South African court applied this rule to the Richterveld people. An Australian court referred to the ICJ's "critical examination" of the theory of *terra nullius* presented in the *Western Sahara Opinion* and cited extensively from the World Court's decision, finally to reaffirm the native title of the Murray Islands inhabitants.[22] While considering the status of Gibraltar, the *Right of Passage case*[23] was analysed and referred to by the Supreme Court of Spain as containing "principles and technical aspects of public international law, which allow the transfer of sovereignty under the law of treaties".[24]

In its jurisprudence, the International Court of Justice underlined several times the importance of the *uti possidetis* doctrine and elevated it to the status of a general principle of international law binding all States. This conclusion articulated

15 *Ye v. Minister of Immigration*, Court of Appeal, New Zealand, 7 August 2008, [2008] NZCA 291, ¶ 116.

16 *Gumne v. Attorney-General of Nigeria*, High Court, Nigeria, 27 February 2002, Case no. (2003) 1 LRC 764, ILDC 22 (NG 2002).

17 *Gabčíkovo-Nagymaros Project case*.

18 *Vienna Convention on Succession of States in Respect to Treaties*, Vienna, 23 August 1978, 1946 UNTS 3.

19 *Case Concerning the Constitutionality of the Agreement between Slovenia and Croatia on Border Traffic and Cooperation*, Constitutional Court, Slovenia, 19 April 2001, Case no. 43/2001, ILDC 402 (Sl 2001) [*Agreement between Slovenia and Croatia case*], ¶ 10.

20 *Western Sahara*, Advisory Opinion, 1975 ICJ Rep. 12 [*Western Sahara Opinion*].

21 *The Richtersveld Community and Others v. Alexkor Ltd. and Government of the Republic of South Africa*, Supreme Court of Appeal, South Africa, Case no. 488/2001, ¶ 45.

22 *Mabo v. Queensland (No. 2)*, High Court, Australia, 3 June 1992, (1992) 175 CLR 1.

23 *Right of Passage over Indian Territory* (Portugal v. India), Merits, 1960 ICJ Rep. 6.

24 *Exequatur Procedure Goran U*, Supreme Court, Spain, 20 February 2001, Case no. 1768/1998, ILDC 130 (ES 2001), ¶ 5 [*Exequatur case*].

in the *Mali Frontier case*[25] was adopted by the Constitutional Court of Slovenia in the proceedings concerning the effect of the disintegration of Yugoslavia on boundaries between neighbouring republics. It stated that:

> [i]n terms of international law, at the moment of the creation of the independent and sovereign Slovenia, its former Republican border with Croatia "in the framework of the former SFRY" became its State border, on the basis of the *uti possidetis* principle. This principle of international law which had developed during the gaining of the independence of former American and African colonies, is a generally recognized principle of international law and is, as such, also binding on Slovenia. The International Court of Justice in the Hague had ascribed it such character in the case of Mali v. Burkina Faso, and has also confirmed it in numerous subsequent cases concerning sea borders.[26]

The *Corfu Chanel case* was also of assistance in the realm of the law of the sea, as the US Supreme Court repeated the principle that a strait being a useful itinerary for international passage in its natural state shall not be declared a part of inland water.[27] Additionally, the freedom of international communication, or *jus communicationis* (including the right of innocent passage, freedom of navigation and of the seas) was found to be a fundamental principle of international law rather than an individual right of a private party.[28] While considering the scope of the right of innocent passage, the High Court of New Zealand[29] sought advice in the *Fisheries Jurisdiction case*.[30] Consequently, it concluded that this right is not subject to any restrictions in the exclusive economic zone. Additionally, the US Court of International Trade examined the rights of a coastal State within its exclusive economic zone to determine that "State … possesses nothing more than a preferential fishing zone within its EEZ" and this preferential right shall not be construed as eliminating fishing activities of other States.[31] The entitlement of a coastal State to establish a fishery zone was also an issue in the proceedings before the Supreme

25 *Frontier Dispute* (Burkina Faso v. Mali), Judgment, 1986 ICJ Rep. 554 [*Mali Frontier case*].

26 *Agreement between Slovenia and Croatia case*, ¶ 24. These other cases of the ICJ mentioned by the Constitutional Court of Slovenia include: *Continental Shelf* (Tunisia v. Libya), Judgment, 1982 ICJ Rep. 18; *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment, 1991 ICJ Rep. 53; *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras; Nicaragua intervening), Judgment, 1992 ICJ Rep. 351 and *Territorial Dispute* (Libya v. Chad), Judgment, 1994 ICJ Rep. 6 [*Libya v. Chad case*].

27 *US v. State of California*, 381 US 139, 172 (1965) [*US v. California case*].

28 *Emergia SA v. Ministry of Economy and Finance*, Constitutional Court, Peru, 20 January 2006, Case no. 2689-2004-AA/TC, ILDC 596 (PE 2006), ¶ 3.

29 *Exide Technologies Ltd. V. Attorney-General*, High Court, New Zealand, 16 September 2011, [2011] NZHC 1127.

30 *Fisheries Jurisdiction* (UK v. Iceland), Judgment, Merits, 1974 ICJ Rep. 3.

31 *Koru North America v. US*, 701 F.Supp. 229, 232 (Court of International Trade 1988).

Court of Norway.[32] On the basis of the *Gulf of Maine case*,[33] it resolved that a right exists under international law to do so.

Furthermore, the *Fisheries case* was considered in several national proceedings as a point of normative reference in relation to the doctrine of historic waters developed by the International Court of Justice. This doctrine served American federal courts as a justification for the employment of a straight-base-line method of determining sovereignty of waters between mainland and islands[34] and the Court of Appeal of Amsterdam as a clarification of the method of marking out these baselines for measuring territorial waters.[35] Similarly, the Supreme Court of Nova Scotia referred to the definition of historic bays as construed by the World Court in order to affirm the sovereignty of Nova Scotia over the Spanish Bay which justified the tax imposed by the municipality of Cape Breton on mining companies in the area.[36] Additionally, the US Court of Appeals, Fifth Circuit, determined, on the basis of the *Fisheries case*, that a reach of territorial sea is not left for the independent determination of a coastal State as its frontiers shall be examined in the light of relevant customary rules.[37]

The Supreme Court of Canada in the *Newfoundland Continental Shelf case* was confronted with the problem of the legal status of the continental shelf in the international law of the sea. In addressing the issue, it relied on the *North Sea Continental Shelf cases*. Firstly, it analysed the *Truman Declaration* as the ICJ considered it an initiation of "positive law" on the subject of the continental shelf doctrine.[38] Secondly, the Canadian court emphasised that the entitlement to a continental shelf derives from a coastal State's sovereignty over its land territory and constitutes its natural prolongation into and under the sea.[39] Nevertheless, no full sovereignty as comparable to the land territory may be exercised over the shelf. Finally, it concluded that the right to explore and exploit the continental shelf is vested with Canada rather than the Province of Newfoundland. Similarly, this principle that "the continental shelf viewed as an extension of the land mass of the

32 *A and ors v Norwegian Public Prosecuting Authority*, Supreme Court, Norway, 27 November 2006, Case no. HR-2006-1997-A, ILDC 649 (NO 2006), ¶ 59.

33 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States), Judgment, 1984 ICJ Rep. 246.

34 *US v. California case*, at 164; *US v. Louisiana*, 394 US 11, 68–69 (1969); *US v. Louisiana*, 470 US 93, 110 (1985); *US v. Maine*, 475 US 89, 99 (1986) and *Island Airlines, Inc. v. Civil Aeronautics Board*, 352 F.2d 735, 741 (9th Cir. 1965).

35 *Edwards v. BV Bureau Wijsmuller Scheepvaart Transport-en Zeesleepvaart-Maatschappij*, Court of Appeal of Amsterdam, the Netherlands, 18 June 1987, 94 ILR 362, 366.

36 *Dominion Coal Co. v. Cape Breton*, Nova Scotia Supreme Court, Canada, 48 M.P.R. 174, 194–7 (1963) after Reilly D.M., Ordonez S., *supra* fn. 4, p. 470: "historic bays are those over which the coastal state has publicly claimed and exercised jurisdiction and this jurisdiction had been accepted by other states [as] it is said in the … *Fisheries* Case".

37 *United States v. Postal*, 589 F.2d 862, 869 (5th Cir. 1979).

38 *Reference re Newfoundland Continental Shelf*, Supreme Court, Canada, 8 March 1984, [1984] 1 S.C.R. 86 [*Newfoundland Continental Shelf case*], p. 119.

39 *Newfoundland Continental Shelf case*, p. 96.

coastal nation state appertains in the very nature of things to that national state" was accepted by the High Court of Australia[40] in 1969, which heavily cited the *North Sea Continental Shelf cases*.

The same judgment of the World Court was referred to by the Constitutional Court of Albania[41] to resolve that the delimitation of maritime borders should also follow equitable principles as other methods might fail to yield a fair and equitable result. This approach is consistent in the jurisprudence of the ICJ, as the Albanian court noted that in the *Continental Shelf case* the legal concept of equity was recognised as "a general principle directly applicable as law".[42] The same court in the same decision[43] also consulted and cited the *Black Sea case*[44] to highlight the difference between delimitating the territorial sea of a coastal State that actually means defining its borders, and delimitating other maritime spaces, where a coastal State enjoys certain rights, like in a continental shelf or exclusive economic zone.

The *Nicaragua case*[45] doubtless should be listed as one of the most controversial and stirring but at the same time prominent cases adjudicated by the International Court of Justice on the basis of its compulsory jurisdiction. The respondent in the proceedings, the United States, endeavoured to undermine the final judgment finding that the violation of several international norms in fact took place, by refusing to participate in the merits phase,[46] and undertook steps to hinder the authority and effectiveness of the Court by withdrawing its acceptance of the compulsory jurisdiction.[47] Nevertheless, the decision of the World Court had a momentous impact on the law on the use of force and in this context has influenced the jurisprudence of municipal courts, particularly as far as customary rules are concerned.

Firstly and predominantly, domestic judges treat the *Nicaragua case* as a concretisation of the general prohibition on the use of force in international

40 *Bonser v. La Macchia*, High Court, Australia, 6 August 1969, (1969) 122 CLR 177.

41 *Socialist Party of Albania v President of Albania and ors*, Constitutional Court, Albania, 15 April 2010, Case no. V-15/10, ILDC 2220 (AL 2010), ¶ 88.

42 *Continental Shelf* (Tunisia v. Libya), Judgment, 1982 ICJ Rep. 18, ¶ 71.

43 *Socialist Party of Albania v President of Albania and ors*, Constitutional Court, Albania, 15 April 2010, Case no. V-15/10, ILDC 2220 (AL 2010), ¶ 81.

44 *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment, 2009 ICJ Rep. 61 [*Black Sea case*].

45 *Nicaragua case* and *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Jurisdiction and Admissibility, Judgment, 1984 ICJ Rep. 392.

46 Highet K., *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 ASIL 992 (1985).

47 Shultz G.P., *Letter by US Secretary of State to the UN Secretary-General*, 7 October 1985, Washington, 24 ILM 1742 (1985).

relations.[48] German[49] and Australian[50] courts acknowledged that this prohibition enjoys a universal status of customary international law. Furthermore, the Federal Administrative Court of Germany together with the UK House of Lords[51] on the basis of the jurisprudence of the ICJ found the prohibition has reached the position of *jus cogens* norm. The latter made it clear that it is binding upon States even independently from the UN Charter provisions.[52] Similarly, the Federal Constitutional Court of Germany observed that the World Court found the *Friendly Relations Declaration*[53] to be "a condensed version of applicable customary public international law",[54] especially in relation to the rule that no recognition of territory acquisition by force shall be possible under international law. The US federal district court relied on the ICJ's determination in the *Corfu Chanel case* recognising the principle of international law that States are obligated to refrain from knowingly permitting the use of its territory for purposes conflicting with the rights and interests of other States.[55] Despite the fact that the prohibition on the use of or threat to use force should be applied strictly, participation in collective security systems is permissible[56] as it is the expression of the inherent right of self-defence, individual or collective, recognised in the UN Charter.[57] Nevertheless, it may only be exercised in response to an armed attack,[58] and the use of force against the territorial integrity of another State shall not find any justification, even in the protection of human rights.[59]

Additionally, the Supreme Court of Canada accepted after the *Nicaragua case* that principles of non-intervention and respect for the territorial sovereignty of foreign States should be recognised as "foundational principles" of the international legal regime and as such are considered customary law. It further elucidated

48 *Amin v. Brown*, 27 July 2005, [2005] EWHC 1670 (Ch), ILDC 375 (UK 2005), ¶ 26.

49 *PDS v. German Federal Government*, Federal Constitutional Court, Germany, 22 November 2001, Case no. 2 BvE 6/99 [*PDS I Case*], ¶ C.III.3 and *PDS v. German Federal Government*, Federal Constitutional Court, Germany, 3 July 2007, Case no. 2 BvE 2/07 [*PDS II case*], ¶ C.II.1.a).

50 *Ure v Australia and Director of National Parks*, Federal Court, Australia, 4 February 2016, [2016] FCAFC 8, ILDC 2561 (AU 2016) [*Ure case*], ¶ 35 and 50.

51 *Attorney of the Federal Armed Forces v. Anonymous*, Federal Administrative Court, Germany, 21 June 2005, Case no. BVerwG 2 WD 12.04, ILDC 483 (DE 2005) and *R v. Jones*, 29 March 2006, [2006] UKHL 16, ILDC 380 (UK 2006), ¶ 18.

52 *Kuwait Airways Corporation v. Iraqi Airways Company*, 16 May 2002, [2002] UKHL 19, ILDC 243 (UK 2002) [*Kuwait Airways Corporation case*], ¶ 22.

53 UN General Assembly, Resolution 25/2625, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN*, 24 October 1970, UN Doc. A/RES/25/2625.

54 *East German Expropriation case*, Federal Constitutional Court, Germany, 26 October 2004, Case no. 2BvR 955/00, ILDC 66 (DE 2004) [*East German Expropriation case*], ¶ C.I.2.b.cc).

55 *In re "Agent Orange" Product Liability Litigation*, 373 F.Supp.2d 7, 129 (E.D.N.Y. 2005) [*Agent Orange case*].

56 *PDS I case*, ¶ C.III.3 and *PDS II case*, ¶ C.II.1.a).

57 UN Charter, Art. 51.

58 *PDS I case*, ¶ C.III.2.a.bb).

59 *Ibid.*, ¶ C.III.2.a.dd).

that these principles constitute a limit under international law for the exercise of extraterritorial jurisdiction. Consequently, States must abstain from extending their jurisdiction over matters in respect of which another State has, by virtue of territorial sovereignty, the authority to decide freely and autonomously.[60] In this vein, the *Barcelona Traction case* was examined and followed by the South Africa Competition Appeal Court[61] in its determination that the extraterritorial application of South African laws is permissible but should be carried out with restraint. Besides, under international law, the concept of territoriality in exercising State jurisdiction should be construed as extending over foreign conduct with an effect within the State concerned.

Finally, the *Nicaragua case* was considered an authority by the Federal Criminal Court of Switzerland.[62] It concluded that the selection of political, social, and economic systems is an exclusive competence of each State.

Municipal courts also employed the case-law of the International Court of Justice in relation to *jus in bello* and its practical application in national proceedings. The Kosovar highest court, confronted with the question of the nature of the armed conflict that took place in Kosovo between the Kosovo Liberation Army (KLA) and the Serbian army in the late 1990s, with the later intervention of NATO forces, relied on the *Nicaragua case* and concluded:

> Notwithstanding the issue of the level of control required to internationalize an internal armed conflict, the question remains of the *ius in bello* applicable to concurrent international and internal armed conflict. The ICTY's jurisprudence, given its flexible approach to the "overall control" test managed to establish the presence of internationalized armed conflict in majority of the cases, and as a result has sparsely dealt with this issue. The classic solution is to employ the theory of pairings, enabling the application of different legal regimes between various parties according to their relationship with each other. This approach was taken by the International Court of Justice in the *Nicaragua Case*, where it was held that the connection between the *Contras* and the United States was not of such character that the *Contras* were acting on behalf of the United States. Fighting between the *Contras* and the Nicaraguan Government was accordingly non-international and subject to Common Article 3. The involvement of the United States itself, however, as regards its relation with Nicaragua, attracted the regulation applicable to international armed conflicts, i.e. Geneva Conventions as a whole.[63]

60 *R. v. Hape*, Supreme Court, Canada, 7 June 2007, [2007] 2 S.C.R. 292, 2007 SCC 26, ¶ 46 and 65.

61 *American Soda Ash Corp. v. Competition Commission of South Africa*, Competition Appeal Court, South Africa, 25 October 2002, Case no. 12/CAC/DEC01, ILDC 493 (ZA 2002), ¶ 17.

62 *A v Swiss Federal Public Prosecutor and ors*, Federal Criminal Court, Switzerland, 25 July 2012, ILDC 1933 (CH 2012), ¶ 3.5.

63 *Prosecutor v. Kolasinac*, Supreme Court, Kosovo, 5 August 2004, Case no. AP-KZ 230/2003, ILDC 1756 (XK 2004) [*Kolasinac case*], ¶ 75.

Following the ICJ's lead, the Supreme Court of Kosovo adopted the theory of pairings and found that the armed conflict in Kosovo in 1999 was of international character as between Yugoslavia and NATO along with a non-international armed conflict between the former and KLA.

Further as to the scope of application of international humanitarian law, the Supreme Court of Israel supported its conclusion in *A. and B. v. Israel*[64] with *dictum* from the judgment regarding the dispute between the Democratic Republic of Congo and Uganda.[65] In that decision, the International Court of Justice determined that a state of occupation requires the physical presence of military forces. Consequently, the Israeli court concluded that the Gaza Strip shall not be regarded as under a belligerent occupation due to the fact that the Israeli forces withdrew from the area back in September 2005. Then, the UK House of Lords shared the conclusion of the ICJ pertaining to the obligations of the occupying power in relation to inhabitants of an occupied territory.[66] Of particular relevance was the commitment not to tolerate violence and the duty to confine persons threatening the safety of the population and the occupying power.

In relation to the *Nuclear Weapons Opinion*,[67] the Constitutional Court of Latvia concluded that the 1907 *Hague Convention*[68] had already in 1939 attained customary status.[69] Additionally, both The Hague as well as Geneva Conventions were found by a South African court, on the basis of this advisory opinion, to codify "intransgressible principles of customary international law".[70] Furthermore, following the directive of the World Court in the *Nicaragua case*, the Hungarian Constitutional Court found that Common Article 3 of the Geneva Conventions reflects "elementary considerations of humanity" and, thus, is applicable both in instances of international as well as internal armed conflicts.[71] Further as to the status of rules contained in the *Geneva Conventions*,[72] the Constitutional Court of South Africa recapitulated the *Nicaragua case* that general principles

64 *A. and B. v. Israel*, Supreme Court, Israel, 5 March 2007, Case no. CrimA 6659/06, p. 12 [*A. and B. v. Israel case*].

65 *DRC/Uganda case*.

66 *R (Al.-Jedda) v. Secretary of State for Defence*, 12 December 2007, [2007] UKHL 58 [*Al.-Jedda 2007 case*], ¶ 32.

67 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226 [*Nuclear Weapons Opinion*].

68 *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907.

69 *Kariņš v. Parliament of Latvia*, Constitutional Court, Latvia, 29 November 2007, Case no. 2007-10-0102, ILDC 884 (LV 2007) [*Kariņš case*], ¶ 24.1.

70 *South Africa v. Basson*, Constitutional Court, South Africa, 9 September 2005, Case no. 2005 (12) BCLR 1192 (CC), ILDC 494 (ZA 2005) [*Basson case*], ¶ 174.

71 *Preliminary Judicial Review of Act on Procedures Concerning Certain Crimes Committed during the 1956 Revolution*, Constitutional Court, Hungary, 12 October 1993, Case no 53/1993 (X 13), ILDC 2028 (HU 1993), ¶ V.4.b.

72 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*,

of humanitarian law found in them are binding on states, even if they have not acceded to those treaties.[73] This led the court to decide that, back in the 1980s, South Africa was bound by norms expressed in the *Geneva Conventions*. But the US district federal court[74] noted the *Nuclear Weapons Opinion* suggestion that Articles 35(3) and 55 of the *I Additional Protocol to Geneva Conventions*[75] should not be considered as customary, as they are "powerful constraints for all the States having *subscribed* to those provisions". The significance of this advisory opinion is also reflected in the jurisprudence of domestic courts that identify the principles of distinction[76] and the obligation to protect civilians from harm related to hostilities[77] as customary rules. Then, the Court of Appeal of Versailles found assistance in the decision of the ICJ to resolve that the rules of international humanitarian law have a character of customary law,[78] but underlined their inter-state nature and declined to apply them to private entities. Moreover, the *Nicaragua case* was looked upon by the *Corte Constitucional de Colombia* to identify specific features of humanitarian aid or assistance. This refers particularly to impartiality understood as "the prohibition to distribute humanitarian assistance in a discriminatory way"[79] as prescribed by the World Court.[80]

The main scope of the international humanitarian law of armed conflicts concentrates on the conduct of hostilities by belligerent parties. In this respect, it contains general principles and guidelines as well as specific prohibitions on the use of particular types of weapons. One of the most controversial issues is, thus, whether the nuclear weapon and its use is permissible under international law. The International Court of Justice in the *Nuclear Weapons Opinion* addressed the matter, but it was received with confusion and puzzlement, as "the judges did not condemn nuclear weapons absolutely".[81] Similarly, the municipal courts' perception of the answer given by the Court is problematic, as the national case-law indicates inconsistencies and discrepancies between jurisdictions. The Supreme

Geneva, 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, 75 UNTS 135 and *IV Geneva Convention*.

73 *Basson case*, ¶ 177.

74 *Agent Orange case*, at 130.

75 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, Geneva, 8 June 1977, 1125 UNTS 3.

76 *Public Committee against Torture in Israel v. Government of Israel*, Supreme Court, Israel, 11 December 2005, Case no. HCJ 769/02 [*Public Committee against Torture in Israel case*], ¶ 23 and *Lord Advocate's Reference No. 1 of 2000*, Scottish High Court of Judiciary, 30 March 2001, Misc 11/00, [2001] SLT 507, ILDC 239 (UK 2001) [*Lord Advocate's Reference case*], ¶ 76.

77 *Public Committee against Torture in Israel case*, ¶ 26.

78 *Association France-Palestine Solidarité and Palestine Liberation Organizarion v. Société Alstom Transport SA and ors*, Court of Appeals of Versailles, France, 22 March 2013, Case no. 11/05331, ILDC 2036 (FR 2013).

79 *Case no. A099-13*, Constitutional Court, Colombia, 21 May 2013, Annex 3, available at: http://www.corteconstitucional.gov.co/relatoria/autos/2013/a099-13.HTM (8.04.2013).

80 *Nicaragua case*, ¶ 243.

81 Ware A., *The World Court and Nuclear Weapon: Who is Listening?*, 36 UN Chronicle 4 (December 1999), p. 49.

Court of the Netherlands reached the conclusion that the use of nuclear weapons is not unlawful under all circumstances.[82] The Scottish High Court of Judiciary and the England and Wales High Court were of the opinion that the possession of this kind of weaponry is not incompatible with international law,[83] while the US District Court determined that the opinion of the ICJ "does not consider the production, possession, or refurbishing of nuclear weapons to be a violation of international law".[84] Comparably, the Court of Cassation of Italy did not find justification in the opinion that its deployment or use is an international crime.[85] In contrast, the Federal Constitutional Court of Germany considered the threat or use of nuclear weapons as basically (*grundsätzlich*) contrary to the rules and principles of international humanitarian law,[86] but later resolved that the ICJ was not able to identify a customary rule prohibiting the use of nuclear weapons and in reality left open the question of its permissibility, particularly in extreme circumstances of self-defence.[87]

Nonetheless, international humanitarian law is not the only body of law applicable in the circumstance of armed conflicts, whether international or not in nature. The *Nuclear Weapons Opinion* and the *Construction of a Wall Opinion* led the Supreme Court of Israel to adopt the approach that during such conflicts IHL shall be generally applied as *lex specialis*, but the existing lacunae shall be filed with the rules of international law on human rights.[88] Both the *Corfu Chanel case* and the *Nicaragua case* assisted the Court of Cassation of Italy to reach the decision that respect for inviolable human rights is a fundamental principle of international law.[89] Consequently, in the opinion of the *Corte di Cassazione*, "the emergence of this principle cannot but influence the scope of the other principles that traditionally inform this legal system", including the sovereign equality of States being the foundation of State immunities in international law.

The Supreme Court of Poland[90] consulted the *Barcelona Traction case* to find that the protection of property is a general principle of civilised nations, but

82 *Vereniging van Juristen voor de Vrede and Stichting Miljoenen Zijn Tegen v. Netherlands and ors*, Supreme Court, the Netherlands, 21 December 2001, LJN: ZC3693, Case no. C99/355HR, ILDC 1758 (NL 2001), ¶ 371.

83 *John v. Procurator Fiscal, Dumbarton*, Scottish High Court of Judiciary, 23 July 1999, [1999] ScotHc 194; *Lord Advocate's Reference case*, ¶ 77 and *Hutchinson v. Newbury Magistrates Court*, 9 October 2000, [2000] EWHC QB 61 [*Hutchinson case*], ¶ 21.

84 *Walli and ors v United States*, District Court for the Eastern District of Tennessee, United States, 2 January 2013, ILDC 2476 (US 2013), ¶ 25.

85 *US v. Tissino*, Court of Cassation, Italy, 25 February 2009, Case no. 4461/2009, ILDC 1262 (IT 2009) [*Tissino case*], ¶ 22.

86 *PDS I case*, ¶ A.III.2.a.ee.

87 *Stationierung US-Amerikanischer Atomwaffen auf dem Fliegerhorst Büchel, K v Federal Republic of Germany*, Constitutional Court, Germany, 15 March 2018, Case no. 2 BvR 1371/13, ILDC 2941 (DE 2018), ¶ 49.

88 *Public Committee against Torture in Israel case*, ¶ 18 and *A. and B. v. Israel case*, ¶ 9.

89 *Ferrini case*, ¶ 9.2.

90 *Case no. V CSK 295/07*, Supreme Court, Poland, 12 December 2007.

simultaneously concluded that no international standard exists as to the rules on compensation for expropriation. This Polish case illustrates, therefore, that municipal courts may rely upon decisions of the International Court of Justice as authoritative evidence that no international norm in a particular form has been formed. Interestingly, the legacy of the *Barcelona Traction case* as perceived by municipal courts is not narrowed only to a commercial setting, the general subject-matter of the decision, but provides much broader guidance. Particularly, adjudicating bodies from diverse jurisdictions relied upon the catalogue of *erga omnes* obligations created by the International Court of Justice in its decision. It includes the genocide prohibition[91] and basic human rights,[92] including the prohibition against torture and cruel or unusual punishment,[93] and protection from slavery and racial discrimination.[94]

The principle of self-determination of peoples was acknowledged by the International Court of Justice in the *East Timor case*[95] as one of the essential principles of contemporary international law of *erga omnes* character. It was later recognised as such by the Refugee Review Tribunal of Australia[96] in a case of East Timor inhabitants seeking refugee protection in Australia. Within the Italian legal regime,[97] the basis for the acknowledgement of the special character of this right was rooted in the *Status of South West Africa Opinion*[98] and the *Western Sahara Opinion*. The Italian Council of State referred to self-determination as defined by the ICJ in order to uphold the return of the statute of the Venus of Cyrene to Libya. Within the colonial context, on one hand the former advisory opinion was utilised by the US Court of Appeals for the Ninth Circuit to explicate the status of non-self-governed territories and to pronounce that the authority of the administrating power is limited in relation to trust territories. As the trusteeship status may only be altered with the consent of the United Nations, consequently the United States was not entitled to modify the status of Micronesia.[99] On the other hand, the First Circuit US Court of Appeals considered the compulsory characteristics of a State

91 *Jorgic case*, Federal Constitutional Court, Germany, 12 December 2000, Case no. 2 BvR 1290/99, ILDC 132 (DE 2000) [*Jorgic case*], ¶ III.3.b.bb).

92 *Anonymous Infertile Couple v Public Court of Mazandaran*, Appellate Court, Iran, 11 April 2020, Case No 9709987413101184, ILDC 3149 (IR 2020).

93 *Kane v. Winn*, 319 F.Supp.2d 162, 199 (D. Mass 2004).

94 *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, 9 December 2004, [2004] UKHL 55 [*Immigration Officer at Prague Airport case*], ¶ 46 and *Koowarta v Bjelke-Petersen and Ors*, High Court, Australia, 11 May 1982, [1982] HCA 27, ILDC 2552 (AU 1982), ¶ 64.

95 *East Timor* (Portugal v. Australia), Judgment, 1995 ICJ Rep. 90 [*East Timor case*].

96 *Case no. N93/00294*, Refugee Review Tribunal, Australia, 29 November 1995, [1995] RRTA 2661 [*Case no. N93/00294*].

97 *Italia Nostra v. Ministry of Cultural Heritage*, Council of State, Italy, 23 June 2008, Case no. 3154/2008, ILDC 1138 (IT 2008), ¶ 4.4.

98 *International Status of South West Africa*, Advisory Opinion, 1950 ICJ Rep. 128 [*Status of South West Africa Opinion*].

99 *McComish v. Commissioner of Internal Revenue*, 580 F.2d 1323, 1329 (9th Cir.1978).

under international law and after consulting the *Western Sahara Opinion* stated that the "government must speak for the state as whole: the mere presence of independent tribes or faction within a territory, lacking common institutions, cannot constitute a government in control".[100]

Other legal matters developed in the case-law of the International Court of Justice and subsequently employed in decisions of municipal courts concern international criminal law. In relation to the *Arrest Warrant case*, the UK House of Lords observed that the prohibition of war crimes, crimes against humanity, and torture shall be perceived as a peremptory norm in international law.[101] Similarly, on the basis of the *Bosnia Genocide case*,[102] the *Barcelona Traction case*, and the *Reservations to Genocide Convention Opinion*,[103] the prohibition and prosecution of genocide as prescribed by the *Genocide Convention*[104] have achieved a universal consensus among national adjudicators. The prevention of this most serious among *delicta juris gentium* is considered to constitute *jus cogens* norm and a rule of customary international law, particularly in Canada,[105] Colombia,[106] Germany,[107] Israel,[108] and the United States.[109] Moreover, a domestic court found in relation to the *Bosnia Genocide case* that States may also be found responsible under international law for acts constituting genocide attributed to them but committed by groups and persons.[110] In this context, the *Bosnia Genocide case* was consulted by the Supreme Court of the Netherlands in its famous *Mothers of Srebrenica case*[111] to determine a degree of control over a person or group of persons exercised by a State in order to attribute their conduct to that State under

100 *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2008).

101 *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, 14 June 2006, [2006] UKHL 26 [*Jones case*], ¶ 24 and 48.

102 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment, 2007 ICJ Rep. 43 [*Bosnia Genocide case*].

103 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ Rep. 15.

104 *Convention on the Prevention and Punishment of the Crime of Genocide*, New York, 9 December 1948, 78 UNTS 277.

105 *Mugesera v. Canada (Minister of Citizenship and Immigration)*, Supreme Court, Canada, 28 June 2005, [2005] 2 S.C.R. 100, 2005 SCC 40, ¶ 82 and *Canada (Minister of Citizenship and Immigration), League for Human Rights of B'nai Brith Canada (Intervening) and ors (Intervening) v Mugesera (Léon) and ors*, Supreme Court, Canada, 28 June 2005, 2005 SCC 40, ILDC 180 (CA 2005), ¶ 82.

106 *Case no. C-578/02*, Constitutional Court, Colombia, 30 July 2002, fn. 87 and 163; *Gallón Giraldo and ors, Constitutional Complaint*, Constitutional Court, Colombia, 18 May 2006, Case no. C-370/2006, ILDC 660 (CO 2006) [*Gallón Giraldo case*], fn. 138.

107 *Jorgic case*, ¶ III.2a.

108 *Attorney General of the Government of Israel v. Eichmann*, District Court of Jerusalem, Israel, 11 December 1961, Case no 40/61, 36 ILR 5, ¶ 21.

109 *Sarei v. Rio Tinto, PLC*, ---F.3d--- (9th Cir. 2011), 2011 WL 5041927 [*Sarei II case*], ¶ 18.

110 *Ibid.*, ¶ 19.

111 *Netherlands v Stichting Mothers of Srebrenica and ors*, Supreme Court, the Netherlands, 19 July 2019, Case no. 17/04567, ¶ 3.4.3.

international law. The court explained the effective control standard adopted by the ICJ that allows State responsibility to be invoked under international law.

After the examination in the *Arrest Warrant case* of an arrest warrant against Yerodia – the DRC Minister of Foreign Affairs – issued by Belgian authorities, the International Court of Justice asserted the violation of international law and ordered the cancelation of the warrant. The Supreme Court of Poland relied in its ruling in *Winicjusz N. v. Germany*[112] on the reasoning of the ICJ and determined that the most senior State officials enjoyed immunities under customary international law. The state of international law did not provide any exception in this regard, even in relation to persons accused of or involved in violating *jus cogens* norms. The same conclusion as to the lack of any exemption within the international regime on immunities was reached by the House of Lords, in light of arguments pertaining to the special character of the peremptory norms.[113] Despite contemporary progress of international law, particularly evident in the establishment of international criminal tribunals, the Special Supreme Court of Greece likewise agreed with the continuous application of immunities, including in situations of the possible commission of war crimes and crimes against humanity.[114] Similarly, the High Court of New Zealand referred to the *Arrest Warrant case* in order to conclude that serving foreign ministers suspected of committing crimes against humanity are protected by State immunity *ratione personae*.[115] The same was reasoned by the *Corte di Cassazione* in the *Abu Omar case* highlighting that the immunity under customary international law applies to heads of States, heads of governments, and ministers of foreign affairs,[116] with the last category of officials emphasised by the Federal Criminal Court of Switzerland.[117] The customary principle of absolute immunity of a serving head of State was consistently sustained by the Supreme Court of Sierra Leone.[118] In this municipal decision, however, a distinction was made as to proceedings carried out before domestic and international courts. As to the latter, the personal immunity of high-ranking officials may in fact be waived already in treaties establishing those tribunals.

Furthermore, the *Arrest Warrant case* provided *ratio decidendi* for *Audiencia National* for a refusal to issue an arrest warrant against Paul Kagame – the

112 *Winicjusz N. v. Germany*, Supreme Court, Poland, 29 October 2010, Case No. IV CSK 465/09, p. 25.

113 *Jones case*, ¶ 24 and 48.

114 *Germany v. Margellos*, Special Supreme Court, Greece, 17 September 2002, Case No. 6/2002, ILDC 87 (GR 2002), ¶ 14.

115 *Fang v. Jiang*, High Court, New Zealand, 21 December 2006, (2007) NZAR 420, ILDC 1226 (NZ 2006), ¶ 48. The Court considered the *Arrest Warrant case*, while discussing the *Jones case* decided by the UK House of Lords.

116 *General Prosecutor at the Court of Appeals of Milan v. Adler and ors*, Court of Cassation, Italy, 29 November 2012, Case no. 46340/2012, ILDC 1960 (IT 2012), ¶ 23.7.

117 *A v Swiss Federal Public Prosecutor and ors*, Federal Criminal Court, Switzerland, 25 July 2012, ILDC 1933 (CH 2012), ¶ 5.3.1.

118 *Sesay v. President of the Special Court of Sierra Leone*, Supreme Court, Sierra Leone, 14 October 2005, Case No. SC no. 1/2003, ILDC 199 (SL 2005), ¶ 64.

President of Rwanda – in relation to his involvement in the commission of genocide, crimes against humanity, war crimes, and terrorism[119] due to immunities granted to incumbent heads of States under international law. The National Court of Spain recapitulated, however, after the International Court of Justice that the immunity shall not be equated with impunity, as the prosecution of individuals enjoying immunities for international crimes is possible through other means. Firstly, they may be tried within their own national system of justice, where international immunities do not find application. Secondly, also an international criminal tribunal may be a suitable forum for bringing them to justice. Thirdly, it was observed that the protection from judicial process in foreign fora ends once the individuals concerned cease to hold their public offices. Finally, a State may always waive the immunity enjoyed under international law by its officials. The same list of possible venues for prosecuting high-ranking officials for international crimes despite their immunities was provided by the District Court of The Hague.[120]

Of particular interest is also the reception of the *Arrest Warrant case* and its conclusions by British courts. Twice in 2004 and once in 2005 the Bow Street Magistrates' Court recognised the immunity of foreign senior officials and, thus, refused to issue arrest warrants. In the case of Robert Mugabe[121] the court explicitly mentioned that the judgment of the World Court was scrutinised in the process of reaching the final outcome regarding the President of Zimbabwe. As to Shaul Mozaf,[122] the *Arrest Warrant case* was interpreted as not limiting the scope of customary immunities to incumbent heads of State, heads of government, and foreign ministers. Hence, the court concluded that a person holding the office of a defence minister shall be automatically covered by their protection in foreign jurisdictions. In relation to Bo Xilai, who was at the time the Minister for Commerce of China, the court found that "his functions are equivalent to those exercised by a Minister for Foreign Affairs" as his portfolio included international trade. Hence, by reasoning of the ICJ, he was afforded immunity under international customary rules.[123] Yet, the High Court of England and Wales[124] determined restrictively on the basis of the *Arrest Warrant case* and the *Criminal Mutual Assistance case* that only in relation to a narrow circle of senior State officials should the immunity under international law be recognised. Consequently, the appellant as

119 *Vallmajo I Sala and ors v. Kabareb and 68 Others*, Audiencia National, Spain, Case no. 3/2008, ILDC 1198 (ES 2008).

120 *Case no. C-09-554385-HA ZA 18-647*, District Court of The Hague, the Netherlands, 29 January 2020, ILDC 3131 (NL 2020), ¶ 4.30–1

121 *Re Mugabe*, Bow Street Magistrates' Court, the United Kingdom, 14 January 2004, ILDC 96 (UK 2004), ¶ 2.

122 *Re Mofaz*, Bow Street Magistrates' Court, the United Kingdom, 12 February 2004, ILDC 97 (UK 2004), ¶ 11 and 15.

123 *Bo Xilai*, Bow Street Magistrates' Court, United Kingdom, 8 November 2005, ILDC 429 (UK 2005), ¶ 5.

124 *Bat v. Investigating Judge of the German Federal Court*, 29 July 2011, [2011] EWHC 2029 (Admin) [*Bat case*], ¶ 56–8 and 61.

a Head of the Executive Office of the National Security Council of Mongolia did not fall within this category. Additionally, the *DRC/Uganda case* was utilised within the British jurisdiction to substantiate the determination that foreign agents enjoy immunity from domestic proceedings, even if they have acted outside their instructions or authority.[125] Finally, three judgments of the International Court of Justice addressing the matter of immunities under international law, the *Arrest Warrant*, *Criminal Mutual Assistance*, and *Jurisdictional Immunities cases*, were consulted by the Supreme Court of Appeal of South Africa.[126] Its appeal proceedings pertained to arrest warrants issued by the International Criminal Court against the Sudanese President al-Bashir and obligations of South Africa in relation to them. The court observed that the World Court had been unable to deduce the existence of any exception to immunities in customary international law.

Further to the subject, the Supreme Court of the Netherlands,[127] the District Court of The Hague,[128] and the Supreme Court of Canada[129] shared the determination from the *Jurisdictional Immunities case* that State immunity is a customary rule subject to no exceptions, even justified by serious violations of international human rights law, humanitarian law, and *jus cogens* norms. In the same vein, the England and Wales Court of Appeal observed that in its judgment the "ICJ regards *jus cogens* as a rule of substantive law and immunity as a matter of procedural law and accordingly it does not recognise acts of torture as providing an exception to immunities".[130] In addition, the Canadian court concluded that the territorial tort exception does not apply to State immunities, particularly in relation to the conduct of armed forced during the time of a conflict.[131] Finally, the decision in a case between DRC and Rwanda[132] was followed by domestic courts in establishing that *jus cogens* norms do not necessarily override other rules of international law and do not generate "an ancillary procedural rule" which establishes the jurisdiction, by way of an exception to State immunity. Thus, the breach of peremptory norm is not sufficient to justify the jurisdiction both of the ICJ that is based exclusively on

125 *Jones case*, ¶ 12.

126 *Minister of Justice and Constitutional Development and ors v The Southern African Litigation Centre*, Supreme Court of Appeal, South Africa, [2016] ZASCA 17, ILDC 2533 (ZA 2016).

127 *Stichting Mothers of Srebrenica and ors v. Netherlands and United Nations*, Supreme Court, Netherlands, 13 April 2012, LJN: BW1999, ILDC 1760 (NL 2012), ¶ 4.3.11–4.3.13.

128 *Case no. C-09-554385-HA ZA 18-647,* District Court of The Hague, the Netherlands, 29 January 2020, ILDC 3131 (NL 2020), ¶ 4.13.

129 *Estate of the Late Zahara (Ziba) Kazemi and Hashemi, Canadian Lawyers for International Human Rights (Intervening) and ors (Intervening) v Iran and ors*, Supreme Court, Canada, 10 October 2014, 2014 SCC 62, ILDC 1721 (CA 2014) [*Estate of Kazemi and Hashemi case*], ¶ 154.

130 *The Queen (on the Application of The Freedom and Justice Party and ors, Yehia Hamed), Amnesty International (Intervening) and Redress (Intervening) v Secretary of State for Foreign and Commonwealth Affairs and Director of Public Prosecutions*, England and Wales Court of Appeal, United Kingdom, 19 July 2018, [2018] EWCA Civ 1719, ILDC 3055 (UK 2018), ¶ 109.

131 *Estate of Kazemi and Hashemi case*, ¶ 72.

132 *Armed Activities on the Territory of the Congo (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 ICJ Rep. 6.

the consent of States as well as of national courts that are barred from exercising their authority by State immunity.[133]

Interestingly, the *Jurisdictional Immunities case* was utilised to determine the immunities of international organisations. The decision of the ICJ assisted the Supreme Court of the Netherlands[134] to deconstruct the content of State immunity and the lack of exceptions under international law. Then, the institution was applied analogously to the United Nations.

The *Jurisdictional Immunities case* was also consulted by the High Court of Australia[135] in its proceedings pertaining to the immunity of the Republic of Nauru in a foreign judgment registration. It found that the proceeding for exequatur is in fact an exercise of jurisdictional power in the form of giving effect to a foreign judicial decision comparable to that of a national judgement. Thus, the issue of immunity of a respondent foreign State needs to be evaluated in such a way, as if a court was seized by "a dispute identical to that which was the subject of the foreign judgment". Finally, the matter of immunity from execution against foreign State property was addressed. It is permitted, if "the property in question must be in use for an activity not pursuing governmental non-commercial purposes".

Next, the England and Wales Court of Appeals, while seized with the issue of diplomatic asylum, consulted the *Asylum case*, "the only juridical pronouncements on the topic to carry authority".[136] It cited a few passages from the World Court's judgment in order to identify and explain the difference between the territorial and diplomatic type of asylum.

Finally, the Supreme Court of India[137] looked upon the *Aut dedere aut judicare case* in relation to the prosecute-or-extradite regime under international law. The principle of *aut dedere aut judicare* explains that if a State is not willing to extradite a criminal fugitive, it is obliged to prosecute him or her before its courts. In such a way, a crime and its perpetrator would not go unpunished. This regime was found by the Indian court to receive "the imprimatur of the International Court of Justice".

Municipal courts acknowledged the *UN Reparation Opinion*[138] as a significant contribution to the understanding of the status of international organisations. On this basis, they recognised that intergovernmental organisations are subjects of international law and as such shall be perceived as legal entities distinct from

133 *Tissino case*, ¶ 19; *Jones case*, ¶ 24 and *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, 21 August 2008, [2008] EWHC 2048 (Admin) [*Mohamed case*], ¶ 171.

134 *Stichting Mothers of Srevrenica and ors v. Netherlands and United Nations*, Supreme Court, Netherlands, 13 April 2012, LJN: BW1999, ILDC 1760 (NL 2012), ¶ 4.3.13–14.

135 *Firebird Global Master Fund II Limited v Republic of Nauru*, High Court, Australia, 2 December 2015, [2015] HCA 43, ILDC 2538 (AU 2015), ¶ 48, 79 and 99.

136 *R (B and ors) v. Secretary of State for the Foreign and Commonwealth Office*, 18 October 2004, [2004] EWCA Civ 1334, ILDC 108 (UK 2004), ¶ 86.

137 *Marie-Emmanuelle Verhoeven v India and Ors*, Supreme Court, India, 28 April 2016, (2016) 6 SCC 456, ILDC 2809 (IN 2016), ¶ 124.

138 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Rep. 174.

States establishing and participating in them, provided with a separate legal personality by international law. Consequently, those organisations possess rights and duties and are entitled to raise international claims.[139] By endorsing this conclusion, one of the US district courts held that the United Nations could maintain the action against the United States and private parties before American courts.[140] Additionally, the doctrine of implied powers of international organisations as elucidated in the *UN Reparation Opinion* was endorsed by the Federal Constitutional Court of Germany and applied to the European Union.[141]

Domestic judges have found the *Gabčíkovo-Nagymaros Project case* of exceptional value in relation to legal matters pertaining to State responsibility. Particularly, the International Court of Justice examined the concept of necessity forming a legal defence precluding State responsibility for a wrongful act and accepted its expression provided for in the *Articles on Responsibility of States for Internationally Wrongful Acts*[142] prepared by the UN International Law Commission as the recapitulation of customary norms in this regard. This conclusion guided municipal courts to recognise the customary value of Article 25 ARSIWA, especially in relation to the strict prerequisites that need to be fulfilled in order for the state of necessity to be invoked effectively.[143] Thus, in the opinion of an American court, this restrictive approach warrants the doctrine to be "limited to circumstances in which there is 'grave and imminent peril'".[144] National decisions referring to the *Gabčíkovo-Nagymaros Project case* highlighted that the invocation of this principle is subject to objective assessment and a State raising a defence of necessity is not equipped with the discretionary power to determine its existence.[145] Finally, the *Bundesverfassungsgericht* considered the *Construction of a Wall Opinion* as a confirmation of the customary value of the doctrine of necessity.[146]

This advisory opinion assisted municipal courts in yet another aspect of the law on State responsibility. The UK House of Lords examined the legal consequences

139 *US v. Melekh*, 190 F.Supp. 67, 81 (S.D.N.Y. 1960) and *Van Zyl v. Government of South Africa*, High Court, South Africa, 20 July 2005, 2005 (4) All SA 96 (T), ILDC 171 (ZA 2005) [*Van Zyl case*], ¶ 27.

140 *Balfour, Guthrie & Co., Ltd. v. US*, 90 F.Supp. 831, 833–4 (N.D. Cal. 1950).

141 *G. v. Bundestag*, Federal Constitutional Court, Germany, 30 June 2009, Case no. 2 BvE 2/08, ¶ C.I.2.e.aa.

142 UN General Assembly, Resolution 56/83. *Responsibility of States for Internationally Wrongful Acts*, 12 December 2001, UN Doc. A/RES/56/83, Annex, *Articles on Responsibility of States for Internationally Wrongful Acts*.

143 *R (Corner House Research, Campaign against Arms Trade) v. Director of the Serious Fraud Office*, 10 April 2008, [2008] EWHC 714 (Admin) [*Corner House case I*], ¶ 146; *R (Corner House Research, Campaign against Arms Trade) v. Director of the Serious Fraud Office*, 30 July 2008, [2008] UKHL 60, ILDC 957 (UK 2008) [*Corner House case II*], ¶ 145 and *K. v. Argentina*, Federal Constitutional Court, Germany, 8 May 2007, Case no. 2 BvM 1/03 [*Argentine Necessity case*], ¶ IV.C.2.c.

144 *Republic of Argentina v. BG Group PLC*, 715 F.Supp.2d 108, 124 (D.D.C. 2010).

145 *Corner House case I*, ¶ 147 and *Corner House case II*, ¶ 146.

146 *Argentine Necessity case*, ¶ IV.C.2.c.

of a breach of *erga omnes* peremptory norms and determined that subjects of international law are obligated not to accept an unlawful situation, but also not to aid in preserving such circumstances and to end the violation through lawful means.[147] Similarly, the Constitutional Court of Latvia[148] acknowledged the principle of *ex injuria jus non oritur* requiring non-recognition of unlawful situations as defined in the *Construction of a Wall Opinion*. Furthermore, relying on the *Namibia Opinion*,[149] the Federal Constitutional Court of Germany concluded that the acquisition of territory by force is illegal under international law and in such circumstances other States are under a duty not to recognise these factual developments "to the extent that such non-recognition was not contrary to the vital interests of the inhabitants of Namibia".[150] This "Namibia exception", understood as an acknowledged exception to the rule of general invalidity of domestic acts performed under an illegal regime, was further applied in the United Kingdom.[151] Moreover, the Refugee Review Tribunal of Australia referred to the *Namibia Opinion* to invoke "principle of international law that where a state disowns or does not fulfil its obligations in relation to a territory then it cannot claim to retain any of the rights which it derives from its relationship to that territory".[152]

In the field of diplomatic and consular law, the Constitutional Court of Latvia[153] agreed with the *Tehran Hostages case* that principles underlying and codified in both the *Vienna Conventions on Diplomatic* (VCDR) and *Consular Relations* (VCCR) constitute customary rules within the international law regime. The *LaGrand case* together with the *Avena case* have served courts in different national jurisdictions to address the effect under international law of the violation of Article 36 of the latter. As to the remedies of such a breach, there is rather a consensus among national courts reached based on the case-law of the Court that neither the annulment of conviction[154] nor the suppression of evidence in the form of testimonies of the accused given prior to consular notification[155] is

147 *A (FC) and ors (FC) v. Secretary of State for the Home Department*, 8 December 2005, [2005] UKHL 71, ILDC 363 (UK 2005), ¶ 34.

148 *Kariņš case*, ¶ 32.1.

149 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16 [*Namibia Opinion*].

150 *East German Expropriation case*, ¶ II.C.I.2.b.cc. The obligation of non-recognition of illegal actions of South Africa in regard to Namibia was stressed as well in *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976), fn. 2.

151 *R (Yollari, CTA Holidays Ltd.) v. Secretary of State for Transport*, 12 October 2010, [2010] EWCA Civ 1093 [*Yollari case*], ¶ 75–6.

152 *Case no. N94/02698*, Refugee Review Tribunal, Australia, 18 July 1995, [1995] RRTA 1744 [*Case no. N94/02698*].

153 *Agešins v. Parliament of Latvia*, Constitutional Court, Latvia, 23 November 2006, Case no. 2006-03-0106, ILDC 1062 (LV 2006), ¶ 28.3.

154 *Zhang v. New Zealand Police*, High Court, New Zealand, 25 January 2007, [2007] NZHC 1567 [*Zhang case*], ¶ 27.

155 *People v. Ontiveros*, ---Cal.Rptr.3d---, Court of Appeal (4th D.), California, 23 June 2006, 2006 WL 1725906 [*Ontiveros case*], ¶ 11; *S and ors*, Federal Court of Justice, Germany, 25 Septem-

required under international law. Instead, Oklahoman,[156] Massachusetts,[157] and German[158] judicial organs employed the "review and reconsideration" remedy to determine whether a breach "caused actual prejudice to the defendant in the process of administration of criminal justice". In this process, the procedural default rule should not be applied to enable the effective remedy to be available to defendants.[159] Notwithstanding, the jurisprudence of the ICJ in the opinion of the court of New Zealand does not provide evidence as to the development of Article 36 VCCR into a customary rule.[160]

Furthermore, the International Court of Justice also rendered a landmark decision in the field of international environmental law. The *Gabčíkovo-Nagymaros Project case* provided the normative foundation for the acknowledgement by the Constitutional Court of South Africa of the sustainable development concept.[161] It should be perceived as reconciliation between economic development and environmental protection. Additionally, the *DRC/Uganda case* was relied upon as an authority by the Supreme Court of India to conclude that the principle of sovereignty over natural resources is of customary character in international law.[162] Matters pertaining to environmental protection under international law were also discussed by the highest Indian court in another case, which found that the *Corfu*

ber 2007, 5 StR 116/01, ILDC 1171 (DE 2007) [*Case no. 5 StR 116/01*], ¶ 23; *Case no. 2 BvR 1579/11*, Federal Constitutional Court, Germany, 5 November 2013 [*Case no. 2 BvR 1579/11*], ¶ 22: "Public international law does not demand mandatory inadmissibility of the evidence, meaning inadmissibility solely because of the failure to inform, and independent of the existence of prejudice caused thereby" and *People v. Tapia-Fierro*, ---Cal.Rptr.3d---, Court of Appeal (5th D.), California, 15 September 2005, 2005 WL 2249007, ¶ 4. The court in the first mentioned case stated: "This language strongly suggests the ICJ recognized that the courts in the United States could properly conclude … that suppression of evidence is not a remedy in a criminal proceeding in the United States for a violation of article 36 of the Vienna Convention".

156 *Torres case*, at 1187–8: "*Avena* noted that the remedy directed in that case, the judicial review we here undertake, should be done "with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice".

157 *Gautreaux case*, at 751. The Supreme Judicial Court of Massachusetts highlighted: "[w]e acknowledge and accept the conclusion of the ICJ regarding the obligation that art. 36 creates when clear violations of its notice protocols have been established, that is, to provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation".

158 *German Consular Notification Case*, Federal Constitutional Court, Germany, 19 September 2006, Case no. 2 BvR 2115/01, ILDC 668 (DE 2006) [*German Consular Notification case*], ¶ 71–2.

159 *In re Martinez*, 46 Cal.4th 945, 957 (S. Ct. Cal. 2009).

160 *Zhang case*, ¶ 28.

161 *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management*, Constitutional Court, South Africa, 7 June 2007, Case no. CCT 67/06, ILDC 783 (ZA 2007), ¶ 54 further reaffirmed in *Oudekraal Estates (Pty) Ltd v. The City of Cape Town and Others*, Supreme Court of Appeal, South Africa, 3 September 2009, Case no. 25/08, [2009 ZASCA 85], ¶ 77.

162 *Centre for Public Interest Litigation and Others v. Union of India and Others*, Supreme Court, India, 2 February 2012, Writ petition no. 423 of 2010, ¶ 64.

Channel case evidenced the principle of State responsibility for pollution emanating within one's own territories under international law.[163]

As to the law of treaties, the case-law of the World Court[164] explicitly recognised that the provisions of the *Vienna Convention on the Law of Treaties* should be a part of the realm of customary international law. Analogously, Polish administrative courts accepted that they have achieved within the international legal regime the status of "norms of universally binding customary international law" applicable to all subjects of international law.[165] Consequently, the Polish court determined that the interpretative directives from VCLT shall be utilised in relation to an international agreement between Poland and the Netherlands examined during the municipal proceedings, even if neither of the State parties had been a party to VCLT. Furthermore, the *Gabčíkovo-Nagymaros Project case* constituted the point of reference for the England and Wales Court of Appeal[166] in its conclusion that VCLT relating to the termination and suspension of the operation of a treaty codifies customary norms. Later, the English court followed the distinction of the ICJ that the suspension of an international agreement may be either lawful, when carried out in accordance with rules set forth in VCLT, or contrary to international standards and resulting in State responsibility. Finally, the opinion of the Court[167] declaring Articles 31 and 32 VCLT as reflecting customary rules was considered as authoritative in English[168] and Argentinian[169] jurisdictions, and the relevant interpretative directives were applied in New Zealand even to treaties predating VCLT.[170]

Another matter of international law that has attracted the considerable attention of domestic adjudicators relates to the principle of good faith governing the interpretation and implementation of international obligation. The UK House of Lords[171] adopted the conclusions from the *Nuclear Tests case* that the principle is generally applicable to international obligations of whatever source, in the same manner to international agreements as well as to unilateral commitments. Further, the Lords shared the conclusion that the *bona fide* principle is not of itself a source

163 *Intellectuals Forum, Tirupathi v State of Andhra Pradesh and ors*, Supreme Court, India, 13 February 2006, [2006] INSC 86, ILDC 866 (IN 2006).

164 *Gabčíkovo-Nagymaros Project case*, ¶ 46, 51 and 109.

165 *A. S.A. v. Minister of Finance*, Supreme Administrative Court, Poland, 3 December 2009, Case no. II FSK 917/08 and *Case no. III SA/Wa 2378/19*, Regional Administrative Court in Warsaw, Poland, 13 August 2020.

166 *Yollari case*, ¶ 44.

167 *Libya v. Chad case*.

168 *Czech Republic v. European Media Ventures SA*, 5 December 2007, [2007] EWHC 2851 (Comm), ¶ 15.

169 *Carranza Latrubesse v National State – Ministry of Foreign Relations and Province of Chubut*, Supreme Court, Argentina, 6 August 2013, Case no. C.568 XLIV, C.594 XLIV, ILDC 2383 (AR 2013), ¶ 5.

170 *Mansoun-Rad v. Department of Labour*, Refugee Status Appeals Authority, New Zealand, 7 July 2004, [2005] NZAR 60, ILDC 217 (NZ 2004), ¶ 45.

171 *Immigration Officer at Prague Airport case*, ¶ 61.

of international obligations[172] as expressed in decisions issued in disputes between Nicaragua v. Honduras[173] and Cameroon v. Nigeria.[174]

The International Court of Justice in the *Nottebohm case* restated the rules and principles governing the status and effectiveness of nationality under international law. On that basis, municipal courts[175] ascertained that the "genuine link" between the State and a natural person is required to exercise diplomatic protection, as mere citizenship is not sufficient. Similarly, the doctrine of real and effective or dominant nationality states the condition for other States to recognise this nationality under international law[176] as a State may not effectively advance a claim on behalf of a national of another State.[177] Furthermore, the exclusive competence of a State in regulating the matter of the acquisition of its citizenship has been recognised on an international and domestic level.[178] The High Court of Namibia discussed at length the factual background of the *Nottebohm case* and cited it extensively while addressing naturalisation, nationality, and the legal effects thereof.[179] Additionally, the *Corte Constitucional de Colombia* quoted the World Court's definition of naturalisation.[180]

The Supreme Court of Kosovo also referred to the *Nottebohm case* in a criminal context. The Kosovar court relied on the definition of nationality as proposed

172 *Immigration Officer at Prague Airport case*, ¶ 19 and 62.

173 *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, 1988 ICJ Rep. 69.

174 *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, 1998 ICJ Rep. 275.

175 *Von Abo v. South Africa*, High Court, South Africa, 29 July 2008, Case no. 3106/2007, ILDC 1026 (ZA 2008) [*Von Abo Case*], ¶ 60; *Sykes v. Cleary*, High Court, Australia, 25 November 1992, [1992] HCA 60, (1992) 176 CLR 77 [*Sykes Case*], ¶ 50 and *Refugee Appeal No 76077*, Refugee Status Appeals Authority, New Zealand, 19 May 2009, [2009] NZRSAA 37, ¶ 89.

176 *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980), fn. 14; *Case no. N93/00294*; *Case no. N94/02698*; *Case no. V94/01546*, Refugee Review Tribunal, Australia, 13 May 1996, [1996] RRTA 1095 and *Ministry of the Interior v. BM and BS*, Court of Cassation, Italy, 27 April 2011, Case no 9377/2011, ILDC 2040 (IT 2011), ¶ 2.02. In relation to the latter case, one commentator stated that "it is somewhat uncommon to find a domestic judgment where the case law of the ICJ and particularly that of the PCIJ are so pertinently employed in order to justify the *ratio decidendi*", *see*: Amoroso D., *Ministry of the Interior v. BM and BS*, ILDC 2040 (IT 2011), A1.

177 *Cruz v. Zapata Ocean Resources, Inc.*, 695 F.2d 428, 433 (9 Cir. 1982) [*Cruz case*].

178 *Sykes case*, ¶ 49 *& Case no. II OSK 189/2007*, Supreme Administrative Court, Poland, 8 August 2008: "The boundaries of the freedom in regulating the institution of the citizenship may only be drawn by international agreements, international custom and generally recognized principles in the realm of the citizenship (Art. 3 of the Hague Convention). In its judgment of 6 April 1955 in Nottebohm case the International Court of Justice (ICJ Reports, 1955, p. 23) likewise confirmed the exclusive competence of a State in this regard by stating that every State regulates through a statute its citizenship and conditions of acquiring it".

179 *Poppy Elizabeth Tlhoto v. Minister of Home Affairs*, High Court, Namibia, 2 July 2008, Case no. (P) A 159/2000, ¶ 2, 35 and 51–2.

180 *Case no. C-622/13*, Constitutional Court, Colombia, 10 September 2013, available at: http://www.corteconstitucional.gov.co/RELATORIA/2013/C-622-13.htm (8.04.2014), fn. 47.

by the ICJ in discussing relations between victims of war crimes and a party to a conflict:[181]

> the criterion of ethnicity adopted by ICTY was in any case applied with the understanding and to the effect that the victims enjoy the protected status when the substance of the relations indicate that they do not owe allegiance to, and do not receive diplomatic protection of, the party in whose hands they find themselves, instead, there is an effective connection to another adverse party. ICTY's jurisprudence is duly considered innovative in this aspect, nevertheless, in the substance-based evaluation of the relations between the party to a conflict and the victims, it is also consistent with traditional concept of nationality expressed by the International Court of Justice in Nottebohm case.

This diplomatic protection of nationals vis-à-vis foreign states was discussed in the jurisprudence of the International Court of Justice on several occasions. The definition of the doctrine found in Article 1 of the *Draft Article on Diplomatic Protection*[182] was affirmed by the ICJ[183] as of customary nature. As such, it was relied upon by the Refugee Status Appeals Authority of New Zealand,[184] and the Italian Court of Cassation cited it as expressed in the *Diallo case* in its decision.[185] Also the *Barcelona Traction case* provided the guidelines to British and South African courts in relation to the concept within international law.[186] It was acknowledged that the protection remains the prerogative of a protecting State that may be exercised at its discretion, as no obligation on the side of a State exists in relation to an individual seeking it. As it is not a human right, it may not be enforced as one. As to the diplomatic protection over legal persons, American courts[187] relied on the ICJ determination that a State of incorporation or location of a registered office shall be entitled to exercise it. Furthermore, the High Court of South Africa[188] applied the *Diallo case* to find that a State of shareholders'

181 *Kolasinac case*, ¶ 101.

182 UN ILC, *Report of the Commission to the General Assembly on the Work of Its Fifty-Eighth Session*, YILC 2006, vol. II, Part Two, UN Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), p. 24.

183 *Ahmadou Sadio Diallo* (Guinea v. DRC), Preliminary Objections, Judgment, 2007 ICJ Rep. 582.

184 *Refugee Appeal No. 76044*, Refugee Status Appeals Authority, New Zealand, 11 September 2008, [2008] NZRSAA 80, ¶ 127.

185 *Il Tuo Viaggio srl v. Presidency of the Council of Ministers and ors*, Court of Cassation, Italy, 19 October 2011, Case no. 21581, ILDC 1891 (IT 2011), ¶ 4.2.

186 *Kaunda v. President of South Africa*, Constitutional Court, South Africa, 4 August 2004, Case no. CCT23/04, ILDC 89 (ZA 2004), ¶ 23 and 29; *Van Zyl case*, ¶ 31; *R (Abbasi and Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs*, 6 November 2002, (2002) EWCA Civ 1598 (CA), ¶ 35 and 69; *Occidental Exploration and Production Co. v. Ecuador*, 9 September 2005, (2005) EWCA Civ 1116, ILDC 201 (UK 2005) [*Occidental Exploration case*], ¶ 15.

187 *Spiess v. C Itoh & Company, Inc.*, 643 F.2d 353 (5th Cir. 1981), fn. 6 and *Helmerich & Payne International Drilling Co and Helmerich & Payne de Venezuela, CA v Bolivarian Republic of Venezuela and ors*, District Court for the District of Columbia, United States, 20 September 2013, 971 F Supp 2d 49 (DDC 2013), ILDC 2148 (US 2013), ¶ 18.

188 *Von Abo case*, ¶ 60.

nationality is entailed under international law to exercise diplomatic protection on their behalf. Then, the *UN Reparation Opinion* recognised that there exist important exceptions to the rule that a State may not raise a claim on behalf of a national of yet another State. This *dictum* assisted the US Court of Appeals in concluding that the exercise of diplomatic protection over alien seamen serving on national vessels falls within these exceptions.[189]

As to the legal prerequisites pertaining to the exercise of diplomatic protection under international law, the International Court of Justice underlined in the *Interhandel case*[190] that the obligation to exhaust available domestic remedies is a customary rule. It was applied consequently in national jurisdictions by the South African Constitutional Court[191] and the US Court of Appeals.[192] Additionally, the discussed decision of the World Court assisted the US federal district courts in establishing the permissibility of omitting the recourse to local remedies, when "local remedies would be ineffective or meaningless or would not meet the international standard of minimum justice"[193] and in concluding the non-existence of a violation on the international plane, unless a claimant "has first pursued and exhausted domestic remedies in the foreign state that is alleged to have caused the injury".[194] Finally, the *ELSI case* was consulted in order to clarify that the exhaustion of local remedies is a fundamental default rule in the international legal system, the inapplicability of which needs to be explicitly expressed.[195]

As far as the international dimension of corporate law is concerned, the *Barcelona Traction case* was of particular interest to municipal courts. Firstly, the International Court of Justice was followed in the matter that generally the nationality of a corporation shall be governed by laws of a place of incorporation.[196] Secondly, an American court indicated among others that a corporate personality, with all its privileges and obligations including corporate liability, has been acknowledged by the ICJ to prove the universal recognition of the concept.[197] Thirdly, the US Supreme Court looked upon this international case for assistance in determining that the legal separateness of incorporated entities is not absolute and lifting a corporate veil is permissible under exceptional circumstances, also under international law.[198] This notion was later repeated in a case concerning

189 *Cruz case*, at 433.
190 *Interhandel case* (Switzerland v. USA), Preliminary Objections, 1959 ICJ Rep. 6.
191 *Van Zyl case*, ¶ 101–2 and *Koyabe et al. v. Minister for Home Affairs*, Constitutional Court, South Africa, 25 August 2009, Case CCT 53/08, [2009] ZACC 23 [*Koyabe case*], ¶ 41.
192 *Sarei v. Rio Tinto, PLC*, 46 F.3d 1069, 1095 (9th Cir. 2006) [*Sarei I case*].
193 *American International Group v. Islamic Republic of Iran*, 493 F.Supp. 522, 525 (D.D.C. 1980).
194 *Greenpeace, Inc. v. State of France*, 946 F.Supp. 773, 783 (C.D. Cal. 1996).
195 *Sarei I case*, at 1108.
196 *Porto v. Canon, U.S.A., Inc.*, 1981 WL 381, (N.D. Ill., 1981), ¶ 3 and *Van Zyl case*, ¶ 95.
197 *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 53 (D.C. Cir. 2011) [*Doe case*].
198 *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), fn. 20.

recognition of an arbitration award.[199] Similarly, the *Barcelona Traction case* was of assistance to the US Court of Appeals in its determinations that a separate corporate identity of a corporation does not exclude the responsibility of a State, if such a corporation is state-controlled and instrumental in advancing State policies.[200] Likewise, the corporate veil lifting doctrine for international purposes as set in the *Barcelona Traction case* was discussed by the UK Privy Council.[201]

3.1.2 ICJ decisions as authoritative treaty interpretation

In the previous section, the phenomenon of referring to the decisions of the International Court of Justice and their reception in national legal orders by municipal courts was examined. It was evidenced by almost 180 domestic cases that this process of judicial dialogue is predominantly centred on acknowledging and applying international law as determined by the World Court. ICJ decisions as evidence of international law assist national judicial institutions in discharging their functions in relation to customary norms and general principles of law. Notwithstanding, national judicial organs likewise follow authoritative guidelines expressed in the case-law of the ICJ in relation to the interpretation of international agreements, which either were invoked by parties in their argumentation or were essential to adjudicating a dispute brought to the bench. Also in this context, it is rather uncommon for municipal courts to provide any elucidation as to the basis of reliance on the interpretations of international treaties by the ICJ. The opinion expressed by the US District Court in relation to the interpretation of VCCR is therefore symptomatic:

> the interpretations of the Vienna Convention by the International Court of Justice (I.C.J.) are binding as to the terms of the treaty. To disregard one of the I.C.J.'s most significant decisions interpreting the Vienna Convention would be a decidedly imprudent course.[202]

Nevertheless, whatever is the source of the reception of the Court's pronouncements as to the clarifications of an international treaty, the practice of the domestic judiciary is a fact that cannot be disregarded.

According to Article 92 of the UN Charter, the International Court of Justice is "the principal judicial organ of the United Nations". Consequently, it is the most predestined institution within the United Nations system to authoritatively construe and interpret the instruments of UN law. This function of the ICJ finds its legal basis in Article 36 (2)(a) and (b) of the ICJ Statute. Additionally, the

199 *SerVaas Incorporated v. Iraq and Ministry of Industry of Iraq*, 19 February 2010, 686 F.Supp 2d 346, 358 (S.D.N.Y. 2010).

200 *McKesson Corporation v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995).

201 *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC*, Privy Council, the United Kingdom, 17 July 2012, [2012] UKPC 27, ILDC 2043 (UK 2012), ¶ 27.

202 *US ex rel. Madej v. Schomig*, --- F.Supp.2d --- (N.D. Ill. 2002), 2002 WL 31386480.

founders of the United Nations have already assumed this special role of the World Court, as they envisaged it expressly in Article 96 of the UN Charter by equipping the Court with advisory jurisdiction in relation to principal organs as well as subsidiary ones and specialised agencies. From this perspective, it seems quite understandable that the Court primarily exercises its interpretative functions in relation to the UN Charter, the constituent instrument of the UN system and the modern international regime. This treaty has been already analysed and applied by the World Court on several occasions.

Firstly, several municipal courts in their litigations examined the issue of the conflict of laws in international law. In this vein, the jurisprudence of the International Court of Justice[203] pertaining to Article 103 of the UN Charter was consulted. This provision runs as follows:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Accordingly, domestic courts concluded that international obligations deriving from the Charter take precedence not only over domestic laws, but also over any other international duties of States. This assertion applies equally to commitments under bilateral, regional, and even universal multilateral treaties.[204] Furthermore, as the House of Lords determined, Article 103 uses the phrase "any other agreement" and, consequently, the obligations of States under the UN Charter prevail even over human rights international agreements, which shall not be treated as an exception.[205] Finally, the legal effect of Article 103 extends over UN Security Council resolutions adopted under Chapter VII[206] that are binding upon all UN member States.[207]

203 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Jurisdiction and Admissibility, Judgment, 1984 ICJ Rep. 392 and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. UK), Provisional Measures, Order, 1992 ICJ Rep. 3.

204 *Nada v. State Secretariat for Economy*, Federal Supreme Court, Switzerland, 14 November 2007, Case no. 1A/45/2007, BGE 133 II 450, ILDC 461 (CH 2007), [*Nada case*], ¶ 5.1; *R. (Al-Jedda) v. Secretary of State for Defence*, 12 August 2005, [2005] EWHC 1809 (Admin), ILDC 202 (UK 2005); *A v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Federal Supreme Court, Switzerland, 22 April 2008, Case no. 1A48/2007, ILDC 1201 (CH 2008), ¶ 5.1.

205 *Al.-Jedda 2007 case*, ¶ 35.

206 *Nada case*, ¶ 5.2 and *R (Al.-Jedda) v. Secretary of State for Defence*, 29 March 2006, [2006] EWCA Civ 327 [*Al-Jedda 2006 case*], ¶ 64.

207 *Kuwait Airways Corporation Case* and *A v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Federal Supreme Court, Switzerland, 22 April 2008, Case no. 1A48/2007, ILDC 1201 (CH 2008), ¶ 5.2.

Comparably, the Supreme Court of Canada, in the *Pushpanathan case*,[208] referred to the case-law of the World Court in order to determine the precise meaning of the term "contrary to the Purposes and Principles of the United Nations" from Article 1F(c) of the *Refuge Convention*.[209] The provision lists exceptions to the refugee status. Thus, Articles 1 and 2 of the UN Charter as construed by the ICJ in the *Namibia Opinion* and the *Tehran Hostages case* were consulted. Similarly, the policy of apartheid and other forms of racial discrimination were confirmed to be manifestly incompatible with the principles of the Charter of the United Nations as expressed in the former decision of the Court.[210]

Furthermore, the International Court of Justice in the *Headquarters Agreement Opinion*[211] examined the scope of application of Section 21 of the UN Headquarters Agreement of 26 June 1947 concluded between the UN and the USA, yet another significant instrument of the UN system. It determined that the United States as a party to that instrument "is under an obligation, in accordance with Section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations".[212] The US District Court for the South District of New York further relied upon this interpretation, agreed with "a persuasive statement" of the ICJ, and concluded that an action before the American court did not constitute an "agreed mode of settlement" within the meaning of Section 21 of the Agreement.[213]

Besides the interpretation of treaties of the UN regime, the International Court of Justice engages in construing and applying multilateral treaties and, consequently, national adjudicators refer to its decisions, when confronted with these international agreements. One of the examples of this judicial dialogue refers to the *Genocide Convention* examined among others in the *Bosnia Genocide case*. In this context, domestic courts discussed the case-law of the World Court developed on the basis of the convention in order to illuminate numerous interpretative matters. According to the Quebec Superior Court,[214] the specific intent to destroy a

208 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, Supreme Court, Canada, 4 June 1998, [1998] 1 S.C.R. 982 [*Pushpanathan case*], ¶ 67.

209 *Convention Relating to the Status of Refugees*, Geneva, 28 July 1951, 189 UNTS 137.

210 *Al-Jedda 2006 case*, ¶ 67, *Koowarta v Bjelke-Petersen and Ors*, High Court, Australia, 11 May 1982, [1982] HCA 27, ILDC 2552 (AU 1982), ¶ 64, and *Ashby v. Minister of Immigration*, Court of Appeal, New Zealand, 15 July 1981, 85 ILR 204, 209: "The International Court of Justice has also condemned apartheid as a denial of fundamental rights and a flagrant violation of the purposes and principles of the Charter".

211 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 ICJ Rep. 12 [*Headquarters Agreement Opinion*].

212 *Ibid.*, ¶ 58.

213 *US v. Palestine Liberation Organization*, 695 F.Supp. 1456 (S.D.N.Y. 1988), fn. 18 [*US v. PLO case*]. The district court went on to explain that the "purpose of these proceedings is to enforce the Anti-Terrorism Act of 1987; it is not directed to settling the alleged dispute, concerning the application of Headquarters Agreement".

214 *R. v. Munyaneza*, Quebec Superior Court, Canada, 22 May 2009, 2009 QCCS 2201, ILDC 1339 (CA 2009), ¶ 97.

group in whole or in part is a condition *sine qua non* for proving the commission of the *delictum juris gentium* of genocide. The Canadian court also determined that, while delimitating an "ethnical group" protected under the *Genocide Convention*, both objective elements, such as cultural, social, political, or historical unique features, as well as a subjective perspective, that is the perception of the group by perpetrators, shall be parallelly examined. Additionally, the US Court of Appeals emphasised that special and careful consideration should be given to "the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics", when defining a "protected group" within the meaning of the Convention.[215] Similarly, the double subjective-objective approach in delineating such a group was confirmed. Moreover, the court consulted the *Bosnia Genocide case* in order to determine the extent of State responsibility in relation to the crime of genocide.[216] The ICJ decision established that this responsibility may extend over genocidal acts perpetrated by State organs, as well as individuals or groups, whose actions are attributable to that State, even though no direct State responsibility is provided for in the *Genocide Convention*.

Another multilateral treaty of incomparable significance within the international community that has been within the purview of the International Court of Justice is the *International Covenant on Civil and Political Rights*.[217] The Supreme Court of Israel was called upon to determine the territorial scope of the Covenant. It noted that the ICJ in the *Construction of the Wall Opinion* confirmed its applicability to areas under belligerent occupation. On that basis, the Israeli court did "assume – without deciding the matter – that the international conventions on human rights apply in the area" constituting the Palestinian Occupied Territory.[218] Furthermore, the UK court referred to the decision of the Court to establish that ICCPR is also applicable exterritorialy, whenever an individual is subjected to a jurisdiction of a State party of ICCPR.[219]

Equally, municipal courts considered interpretations of treaties in the field of *jus in bello* rendered by the World Court as possessing authoritative value. The England and Wales Court of Appeals relied on the *DRC/Uganda case* to establish the scope of Article 43 of the *Hague Regulations* concerning obligations of an occupying power. After the ICJ, the court resolved that they comprise of a duty to protect a population against any form of violence, including violence by a third party, and to ensure respect of international human right standards as well as international humanitarian law.[220] Those principles were accordingly applied to situations in Iraq. The same provision of the *Hague Regulations*, in connection

215 *Sarei II case*, ¶ 19.

216 *Ibid.*, ¶ 20.

217 *International Covenant on Civil and Political Rights*, New York, 16 December 1966, 99 UNTS 171.

218 *Mara'abe case*, ¶ 27.

219 *R (Al-Skeini) v. Secretary of State for Defence*, 21 December 2005, [2005] EWCA Civ 1609, ILDC 376 (UK 2005), ¶ 101.

220 *Al-Jedda 2006 case*, ¶ 38.

with Article 52, was scrutinised by the Supreme Court of Israel. It shared the opinion expressed in the *Construction of the Wall Opinion* that the third part of the *Hague Regulations* applies to the territory of belligerent occupation, as it concentrates on functions and roles of the military government.[221] This assertion led the Israeli court to find that the Regulations in fact grant the military commander the authority to decide upon the necessity of the construction of a separation fence. Again, the *Construction of the Wall Opinion* led the court in the *Mara'abe case* to confirm the applicability of the *IV Geneva Convention* to the territories under occupation, including Judea and Samaria.[222] Furthermore, the *Nuclear Weapons Opinion* made it clear that *Hague Convention IV* including the Hague Regulations do not define "poison and poisoned weapons", the employment of which is forbidden under international law. As no consensus has been reached within the international community in this regard so far, US courts[223] did not find the use of herbicides in the Vietnam War as contrary to international law.

Other instruments from the realm of international humanitarian law examined by the World Court are the Geneva Conventions. Their Common Article 3 was characterised in the *Nicaragua case* as a "minimum yardstick" of *jus ad bello*. On this basis, several municipal courts concluded that the said provision is a general expression of fundamental rules and minimum guarantees applicable to all types of armed conflicts, whether of international or non-international character.[224] The same opinion was shared by the *Hoge Raad* in its consideration of grave breaches of IHL in a criminal case.[225]

But the most litigated treaty before the International Court of Justice so far has doubtless been the *Vienna Convention on Consular Relations*. Three cases, the Consular triad, the *Breard case*, the *LaGrand case*, and the *Avena case*, have been brought to the bench of the World Court for adjudication, and they are milestones in the development of the authoritative interpretation of VCCR, and Article 36 in particular. This provision, in a nutshell, obligates a receiving State to inform consular authorities of a sending State about the detention of its national.

221 *Mara'abe case*, ¶ 17. In this regard, the Israeli court did not share the conclusion of the ICJ that Regulation 23(g) applies only at the time of hostilities and not to the state of occupation.

222 *Mara'abe case*, ¶ 14: "We are aware that the Advisory Opinion of the International Court of Justice determined that The Fourth Geneva Convention applies in the Judea and Samaria area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned, seeing as the government of Israel accepts that the humanitarian aspects of The Fourth Geneva Convention apply in the area, we are not of the opinion that we must take a stand on that issue in the petition before us".

223 *Agent Orange case*, ¶ 116 and *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3D 104, 120 (2 Cir. 2008) [*Dow Chemical case*].

224 *Basson case*, ¶ 177–8; *H. v. Public Procurator*, Hague Court of Appeal, Netherlands, 29 January 2007, Case no. LJN: AZ7143, ILDC 636 (NL 2007) [*H. v. Public Procurator case*], ¶ 5.2.2, *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 163 (D.D.C. 2004), and *R. v TRA*, Supreme Court, United Kingdom, 13 November 2019, [2019] UKSC 51, ILDC 3050 (UK 2019), ¶ 18.

225 *H v. Public Prosecutor*, Supreme Court, Netherlands, 8 July 2008, Case No 07/10063 (E), LJN: BG1476, ILDC 1071 (NL 2008), ¶ 5.2.2.

Additionally, it grants a sending State the right of visit and communication with its detained citizen. Moreover, a detained person shall be entitled to request a notification of their detention to the consular officers of their home State. The effect of Article 36 VCCR in relation to individuals concerned was one of the main points of controversy in the proceedings before the World Court. Holdings of the International Court of Justice interpreting it as creating individual rights were presented by the UK Court of Appeal as another example "that treaties may in modern international law give rise to direct rights in favour of individuals".[226] Furthermore, some American judges settled that "the I.C.J. ruling conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts … have left open";[227] nevertheless others referred to the plain language of these decisions to find that even if VCCR creates individual rights they are not suitable to be privately enforced in national fora.[228]

The indicated case-law of the World Court has been considered as a guideline for national courts in their examination of VCCR and State obligations deriving thereof. The Court of Appeal of Singapore considered the term "without delay" referring to the obligation of a receiving State to notify a consular post of a sending State upon a request of a detained national of the latter. It found that it should not be construed as meaning "immediately upon arrest",[229] because the obligation to notify is correlated with the realisation of detaining authorities that a detainee is a foreign national. The same Singaporean court,[230] together with courts in Germany[231] and the United States, including both the Texas state court,[232] and its federal counterparts,[233] agree with the opinion of the ICJ that VCCR does not require consular notice prior to an interrogation. In light of the determinations of the Court, the High Court of New Zealand emphasised that the obligation of consular notification does not arise in instances of brief or transitory detention, e.g. for evidential breath testing.[234]

226 *Occidental Exploration case*, ¶ 19.

227 *Madej case*, at 979. *See also*: *US ex rel. Madej v. Schomig*, --- F.Supp.2d --- (N.D. Ill. 2002), 2002 WL 31386480, ¶ 1: "After *LaGrand*, however, no court can credibly hold that the Vienna Convention does not create individually enforceable rights".

228 *Bell v. Commonwealth of Virginia*, 264 Va. 172, 187–188 (S. Ct. Virginia 2002) [*Bell v. Virginia case*] and *Ontiveros case*, ¶ 11.

229 *Van v. Public Prosecutor*, Court of Appeal, Singapore, 20 October 2004, [2004] SGCA 47, ILDC 88 (SG 2004) [*Van case*], ¶ 31–2.

230 *Ibid.*, ¶ 33.

231 *German Consular Notification case*, ¶ 71–2; *Case no. 2 BvR 1579/11*, ¶ 25.

232 *Sorto v. State*, Court of Appeals of Texas, USA, 173 S.W.3d 469, 483 (2005).

233 *Cisneros case*, at 732 and *Leal case*, ¶ 9, where the court held "[t]he ICJ's opinion in *Avena* repeatedly emphasized its holding was limited to a determination that the Mexican nationals' individual rights recognized by Article 36 of the Vienna Convention had been violated *following* (emphasis added by the court) their arrest, detention, or placement in official custody".

234 *Zhang case*, ¶ 44–5.

Interestingly, the Federal Court of Justice of Germany decided to revise its previous jurisprudence pertaining to State obligations pursuant to Article 36 VCCR in the aftermath of the *LaGrand* and *Avena cases*. It resolved that the arresting authorities, mostly the police, are under a duty to inform a detained individual of his or her rights under VCCR, as the prior determination relating only to a judge was found to be "too narrow".[235] Moreover, the *LaGrand case* was considered an interpretative guidance by the German court in its determination that the rights envisaged in Article 36 are conditional only on the formal prerequisite of foreign nationality.[236]

Finally, the International Court of Justice has been called upon to assist parties in settling their disputes arising from bilateral treaties and, subsequently, municipal courts examine the interpretation of those international instruments provided by the ICJ. For instance, in the *US Nationals in Morocco case* the core of the controversy centred around the scope of the US-Moroccan Treaty of Peace and Friendship of 1836 and the General Act of Algeciras of 1906. The Court of Appeal of Rabat in Morocco determined, in line with the decision of the ICJ, that the exclusive jurisdiction privilege of American consular officers extended only to proceedings in which both parties were American nationals. As the dispute at hand concerned a Moroccan subject and a citizen of the USA, the Moroccan court upheld its jurisdiction.[237] Likewise, the interpretation of the Act of Algeciras rendered by the International Court of Justice was relied upon by the *Cour de Cassation* in the *Bendayan case* in its determination that French courts in Morocco had jurisdiction to hold trials of American citizens accused of contravening exchange regulations.[238]

Similarly, the *Tribunal Criminel de Casablanca* was confronted with a plea to the jurisdiction as a defendant argued that he should have been tried by a court of the victim's nationality on the basis of the regime of capitulations. This assertion was rejected, and the Casablanca court's jurisdiction was asserted:

> this argument can no longer be upheld since the decision of the Hague International Court of Justice of 27 August 1952 … this decision lays down the extent of capitulary rights subsisting in favour of the United States in the French zone in Morocco, by virtue of the Treaty of 1836 by declaring

235 *Case no. 5 StR 116/01*, ¶ 19.

236 *German Consular Notification case*, ¶ 66: "A teleological reduction of the Art. 36 (1)(b) VCCR towards foreigners who have their center of life in the receiving State is contrary to the unambiguous wording of the rule that is dependent solely on the formal criterion of foreign nationality. The International Court of Justice rejected implicitly a restriction on the applicability of the obligation to notify by stating that the fact that the LaGrand brothers had their center of life in the US from an early youth is without legal significance".

237 *Administration Des Habous v. Deal*, Court of Appeal of Rabat, Morocco (French Protectorate), 12 November 1952, 19 ILR 342, 345–344.

238 *Bendayan case*, Court of Cassation, France, 4 March 1954, 1954 *Bulleting des Arrêts de la Court de Cassation, Chambre Criminelle* 182, in: 49 AJIL 267 (April 1955).

> that their consular jurisdiction extends, in application of that treaty, only to civil and criminal disputed between United States citizens and protected persons.[239]

Equally, the Court of First Instance of Tangier confirmed its competence to hear civil cases brought by Moroccan nationals against American persons.[240] On the other side of the Atlantic, the term "dispute" from the Treaty of 1836 was construed by the US Supreme Court, which shared the conclusion of the ICJ in this regard, as covering criminal as well as civil proceedings.[241] At this point, it is important to stress that the jurisprudence of both the International Court of Justice and municipal courts built around the *US Nationals in Morocco case* may serve as one of the best illustrations of prolific and meaningful inter-judicial dialogue. On one hand, the ICJ assisted two sovereign States in settling their dispute in accordance with international law by interpreting international treaties concerned. On the other hand, this international decision was utilised at the national level to assist local judges and substantiate their decisions.

Besides the two aforementioned treaties regulating the consular jurisdiction in Morocco, the International Court of Justice interpreted also, as a side matter, the Treaty for the Organization of the French Protectorate in the Shereefian Empire signed at Fes, 1912, in order to determine the scope of the rights and privileges of France as a protecting power. The Court of First Instance of Rabat agreed with the World Court that its provisions that regulated the entitlement of France in the realm of international relations of the Shereefian Empire were exceptionally broad and, hence, encompassed the treaty-making powers.[242]

3.1.3 ICJ decisions and rationale behind international norms

In certain situations, municipal courts find it necessary not only to identify an international rule applicable to a case at bench, but also to present it in a wider perspective. This perspective is frequently important for understanding and delimitating the scope of an international norm and, thus, national judges refer to the rationale behind its development. Two main purposes of this approach are to provide a justification and explanation in regard to international law or to analyse a relevant norm of international law from a functional and teleological perspective, when a literal one does not provide an accurate and unambiguous solution.

239 *Ministèr Public v. Mohamed Ben Djilalli Ben Abdelkader 'Teignor'*, Morocco (French Protectorate), Tribunal Criminel de Casablanca, 6 November 1952, (1953) 80 *Clunet* 666, cited after: Schreuer Ch., *The Implementation of International Judicial Decisions by Domestic Courts*, 24 ICLQ 153, 177 (April 1975).

240 *X v. Mackay Radio Corporation*, Court of First Instance of Tangier, Morocco, 9 March 1954, 6 *Revue Marocaine de Droit* 228 (1954), in: 49 AJIL 267 (April 1955).

241 *Reid v. Covert*, 354 US 1, 61 (1957).

242 *Ecoffard v. Cie Air France*, Court of First Instance of Rabat, Morocco, 29 April 1964, 39 ILR 453, 456.

Moreover, it is not surprising to conclude that the recourse to these foundations of international law by domestic judicial organs is performed mostly in relation to legal institutions unknown to or very distant from national legal regimes. Consequently, their aim is to better understand the unfamiliar legal order in which municipal courts must navigate.

The jurisprudence of the International Court of Justice is doubtlessly an adequate source for domestic courts as well as parties in proceedings to support their argumentation in regard to the rationale behind international norms, as their *motifs* quite often go beyond the literal meaning of a particular treaty provision or customary principle but locate them in a historical and functional context. However, it needs to be stressed that this search for a legal rationale on the side of municipal courts is rather a rare phenomenon, with few examples presented and analysed in the following paragraphs.

The South African courts,[243] confronted with the principle of the exhaustion of local remedies, consulted the *Interhandel case* and concluded that an aim of this rule is to provide the State in which the violation of international treatment standards occurred with an opportunity to redress the breach within its domestic legal order. As the Constitutional Court of South Africa explained: "[t]his affords states the opportunity to find their own solutions and to make beneficial use of their access to relevant facts, information as well as their familiarity with the technicalities of the dispute",[244] before a recourse to an international dispute settling mechanism is permitted. Also, the US Court of Appeals consulted the aforementioned decision of the ICJ to this end.[245]

Similarly, when the Constitutional Court of Slovenia applied the principle of *uti possidetis* to borders of new States emerging from the dissolution of the Yugoslavia, it referred to the *Mali Frontier case* to provide the rationale behind the adoption of this rule.[246] The court elucidated the origins of the principle, which was a response to the phenomenon of new Latin American and African States gaining independence from former European powers, and identified the legal values that the rule is supposed to protect. Among them are international stability, the integrity of newly created States, and the prevention of fratricidal conflicts after the withdrawal of colonial authorities.

The *Nuclear Weapons Opinion* was cited by the Constitutional Court of South Africa in the *Basson case*[247] to stress the vital importance of international humanitarian law for the whole international community and its customary rules codified in the Hague and Geneva Conventions. This customary status is manifest in its fundamental role of respecting human persons and "elementary considerations of

243 *Van Zyl case*, ¶ 101–2 and *Van Zyl v. South Africa*, Supreme Court of Appeal, South Africa, 20 September 2007, [2007] SCA 109 (RSA), ILDC 839 (ZA 2007), ¶ 89.

244 *Koyabe case*, ¶ 41.

245 *Sarei I case*, at 1117. The US Court of Appeals along with the *Interhandel case* mentioned also in its opinion *Certain Norwegian Loans* (France v. Norway), Judgment, 1957 ICJ Rep. 9.

246 *Agreement between Slovenia and Croatia case*, fn. 15.

247 *Basson case*, ¶ 174.

humanity" even in armed conflicts, and in the broad accession to the aforementioned international instruments.

Finally, the England and Wales High Court when confronted with the matter of diplomatic immunities discussed the *Arrest Warrant case*. It focused on the fact that immunities enjoyed by high-ranking state officials are not recognised for the personal benefit of their holders but are aimed at facilitating to the widest possible extent the exercise of their official duties and are linked to the representative character of the office they hold.[248] This judgment of the International Court of Justice presenting the basis of immunities of ministerial level politicians as a safeguard ensuring the performance of their official functions on behalf of a State led the same court to the conclusion that units within a federal state that are not competent to engage in diplomatic relations are not entitled to the State immunity.[249] Furthermore, the Italian Court of Cassation scrutinised the *Arrest Warrant case* in order to conclude:

> [t]his judgment was based on the recognition of a common State practice leading to the adoption of norms that facilitate the elaboration of a code of reciprocal conduct, whose broader aim is the good functioning of inter-State relations

and

> [a]lso to be analysed is the judgment of the International Court of Justice in *Democratic Republic of Congo v. Belgium*, which provides a general figure of customary immunity from a particular case of immunity. This judgment underlines the functional character of immunity, which the Court links to the smooth functioning of international relations as opposed to dogmatic principles such as the sovereign equality of States (*par in parem non habet imperium*).[250]

In the same vein, but citing the much earlier *Tehran Hostages case*,[251] the Court of Appeal of Kenya explained that the rationale behind immunities *ratione personae* and *ratione materiae* is to ensure the smooth conduct of international relations as they are "essential for the maintenance of a system of peaceful cooperation and co-existence among States".[252]

248 *Bat case*, ¶ 56–7.

249 *R (Alamieyeseigha) v. Crown Prosecution Service*, 25 November 2005, [2005] EWHC 2704 (Admin), ¶ 22–3.

250 *Germany v. Prefecture of Vojotia*, Court of Cassation, Italy, 20 May 2011, Case no. 11163/2011, ILDC 1815 (IT 2011) [*Prefecture of Vojotia case*], ¶ 46 and 34.

251 *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), Order, Provisional Measures, 15 December 1979, 1979 ICJ Rep. 7.

252 *Attorney General and ors v Kenya Section of the International Commission of Jurists*, Court of Appeal, Kenya, 16 February 2018, ¶ 96. s

3.1.4 ICJ decisions and sources of international law

The examination of domestic judicial decisions has revealed that the jurisprudence of the International Court of Justice is essential in the application of international law by municipal courts in yet another aspect pertaining to the sources of international law. It provides domestic judges with necessary guidelines on the status and interplay between different types of these sources. The identified tendency may be explained by two distinct reasons. The first one is probably prosaic. Although we are witnessing increased codification efforts within the international legal regime, led by the UN International Law Commission and similar bodies, what is still lacking is an authoritative and comprehensive international instrument dedicated in full to the subject of sources of international law. Even in this realm, the existing documents are fragmentary, as the Vienna Convention on the Law of the Treaties governs only international agreements. Consequently, the case-law of the ICJ fills this gap, particularly in relation to customary international law, and thus is so willingly studied and utilised by national adjudicators.

Secondly, when the total number of cases decided by international tribunals and municipal courts is compared, it goes without question that the latter courts are principal institutions dealing with questions of international law. In order to navigate through any legal regime, including the international law order, any adjudicator needs to refer to some metanorms. Those norms play a notable role as they set the fundamental principles and basic structure of any system, govern the procedure of the creation of secondary norms, and specify the hierarchy between them.[253] On a national level, metanorms are expressed traditionally in constitutions or other similar documents. Nevertheless, at the international level they are scattered and dispersed. Decisions of the International Court of Justice, applying and clarifying metanorms within the international regime, provide necessary assistance.

In this context, the issue of the creation and obligatory features of customary rules of international law has attracted considerable attention among national judges. On the basis of the *North Sea Continental Shelf cases* and in one instance on the *Asylum case*, domestic judicial institutions in their decisions shared the view that in order for a customary norm to be created, two obligatory components need to be present – subjective and objective elements in the words of the Supreme Court of the Philippines.[254] With the same meaning in mind, other domestic judicial bodies labelled them differently. The first constituent was defined as a

253 Ávila H., *Theory of Legal Principles*, Springer Netherlands, 2007, p. 83 and Widłak T., *O Konstytucjonalizacji Prawa Międzynarodowego – Ku Konstytucji Społeczności Międzynarodowej?*, VIII Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego (2010), p. 59.

254 *Bayan v. Romulo, Muna v. Romulo and Ople*, Supreme Court, Philippines, 1 February 2011, GR no 159618, ILDC 2059 (PH 2011), ¶ 90.

"constant and uniform usage" by the South Africa Competition Tribunal[255] and the Supreme Court of Israel.[256] Furthermore, other national courts from Australia, the Netherlands, New Zealand, Singapore, the United Kingdom, and the United States clarified, in accordance with the ICJ decisions, that State practice needs to meet the threshold of being "both extensive and virtually uniform",[257] or "general and consistent", as did the US Board of Immigration Appeals.[258]

Notwithstanding, in the opinion of a few national adjudicating bodies,[259] international law does not demand the absolute conformity of State practice within the international community. To substantiate this approach, domestic courts relied on a citation from the *Nicaragua case* providing that "it [is] sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule". Furthermore, the Hong Kong High Court[260] repeated the determination of the ICJ in the *Asylum case*. Considering the example of Peru examined by the Court, it found that States should not be bound by a customary rule, provided that they incessantly and firmly rebut it by their actions.

According to municipal courts, relying on the jurisprudence of the World Court in their decisions, the second traditionally recognised element mandatory for the recognition of the formation of a customary rule of international law is "a conception that the practice is required by, or consistent with, prevailing international law", or simply *opinion juris*.[261] In the same vein, the US Court of Appeals for the Second Circuit emphasised that State practice requires additionally to be "rendered obligatory by the existence of a rule of law"[262] seconded by the Belgian

255 *Competition Commission et al. v. American Natural Soda Ash Corp et al.*, Competition Tribunal, South Africa, 30 November 2001, Case no. 49/CR/Apr00 and 87/CR/Sep00, p. 15.

256 *Abu Aita v. Regional Commander of Judea and Samaria*, Supreme Court, Israel, 5 April 1983, HC 69/81 [*Abu Aita case*], ¶ 90.

257 *Polyukhovich v. Commonwealth*, High Court, Australia, 14 August 1991, [1991] HCA 32 [*Polyukhovich case*], ¶ 28; *Ure case*, ¶ 30; *Case no. C-09-554385-HA ZA 18-647*, District Court of the Hague, the Netherlands, 29 January 2020, ILDC 3131 (NL 2020), ¶ 4.37; *Zhang case*, ¶ 24; *Yong v Public Prosecutor*, Court of Appeal, Singapore, 14 May 2010, [2010] SGCA 20, ILDC 1520 (SG 2010), ¶ 98; *Republic of Serbia v. Imagesat International NV*, 16 November 2009, [2009] EWHC 2853 (Comm) [*Imagesat case*], ¶ 131; *Committee v. Regan Case*, at 940; and *Buell v. Mitchell*, 247 F.3d 337, 373 (6th Cir. 2001) [*Buell case*], where it was concluded that: "[t]he prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm".

258 *Re Medina*, Board of Immigration Appeals, USA, 7 October 1988, ILDC 1394 (US 1988), ¶ 22.

259 *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F.Supp.2d 331, 336 (S.D.N.Y. 2005); *C v. Director of Immigration*, High Court (Court of First Instance), Hong-Kong, 18 February 2008, [2008] 2 HKC 165, ILDC 1119 (HK 2008) [*Director of Immigration case*], ¶ 114; *Democratic Republic of the Congo and ors v. FG Hemisphere Associates LLC*, Court of Final Appeal, Hong Kong, 8 June 2011, (2011) 14 HKCFAR 95, ILDC 1970 (HK 2011) [*DRC v. FG HA LLC case*], ¶ 120, *Polyukhovich case*, ¶ 28, and *Ure case*, ¶ 32.

260 *Director of Immigration case*, ¶ 70.

261 *Zhang case*, ¶ 24.

262 *Flores case*.

Court of Cassation,[263] as mere moral or political causes, considerations of comity, expediency, or tradition do not suffice to establish the existence of a customary rule. The Federal Court of Australia cited an extensive passage from the *North Sea Continental Shelf cases* to make the same point.[264] Additionally, the Israeli Supreme Court,[265] as the ICJ in the *Asylum case*, explained that a party invoking a customary rule is under a duty to prove its existence in order to prevail in a case.

As far as the binding force of international treaty norms is concerned, it was rightly concluded, taking into account the *Nicaragua case*, that conventional provisions have binding force only in relation to States that consented to be bound by them, mostly in the process of ratification.[266] Nonetheless, it is rather unlikely that an agreement resembling the one discussed by the Court in the *Anglo-Iranian Oil case*[267] executed between a foreign private entity and a government constitutes a treaty under international law.[268] Similarly, in relation to matters governing the conclusion of international agreements, a judicial determination in the dispute between Qatar and Bahrain[269] was acknowledged by the Federal Constitutional Court of Germany. It determined that while "the lack of a ratification clause is an indication that the document in question is not a treaty", all circumstances should be analysed to resolve whether a treaty was formed, and the mere lack of this clause is not decisive of itself.[270] Further, the "objective circumstances that are sufficiently clear point to the existence of a consenting will" are adequate to establish a treaty amendment without a need for proving a manifest intent.[271] Finally, the *Bundesverfassungsgericht* considered the *Kasikili Island case* for assistance in deciding that developments of an international agreement may take the form of a concretisation of the content of a treaty by organs of an international organisation, an authentic interpretation, or subsequent practice, and do not necessarily always constitute the conclusion of a new treaty.[272]

In relation to the interpretation of international treaty norms, it was recognised by municipal courts that the international legal regime constitutes a distinct, autonomous, and self-contained legal system, independent from municipal orders.

263 *NML Capital Limited v Argentina*, Court of Cassation, Belgium, 11 December 2014, Case no. C.13.0537.F, ILDC 3011 (BE 2014).

264 *Ure case*, ¶ 31.

265 *Abu Aita case*, p. 51.

266 *Doe case*, at 35.

267 *Anglo-Iranian Oil Company* (UK v. Iran), Primary Objection, Judgment, 1952 ICJ Rep. 93 [*Anglo-Iranian Oil case*].

268 *American Jewish Congress v. Carter*, 19 Misc.2d 205, 223–224 (N.Y. S. Ct. 1959); *Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha*, District Court of Tokyo, Japan, 1953, 20 ILR 305, 308 [*Kaisha case*] and *Anglo-Iranian Oil Company Ltd. v. S.U.P.O.R.*, Civil Court of Rome, Italy, 13 September 1954, 22 ILR 23, 41 [*S.U.P.O.R. case*].

269 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, 1994 ICJ Rep. 112.

270 *PDS I case*, C.I.1.a).

271 *Ibid.*, C.I.2.

272 *Ibid.*, C.II.

Thus, interpretation directives developed within this system shall be taken into account by domestic judges engaging in the process of construing, interpreting, and applying treaty norms. On this basis, as the ICJ rightly determined,[273] the natural and ordinary meaning of a provision shall be assessed and if this process provides meaningful results, then no further steps are required.[274] However, in merited situations, the priority may be given to the systematic-teleological method of interpretation.[275] As far as interpretative directives of international instruments are concerned, the Federal Supreme Court of Switzerland[276] referred to an order in the *Right of Passage case*[277] to indicate the presumption of compatibility or presumption against normative conflict. It connotates an assumption that a State acts in conformity with existing law when interpreting a text of an international instrument. This presumption is closely associated with the systematic interpretation, according to the Swiss court.

Yet another important aspect discussed by municipal courts on the basis of the jurisprudence of the World Court concerns relations between customary and treaty norms and their mutual interdependence. The *North Sea Continental Shelf cases* have been looked upon to conclude that a customary rule may have its roots in and emerge from an international agreement.[278] According to the Australian Federal Court, such a treaty "may 'crystallise' a new rule of customary law", reflect, or codify it.[279] Even in such a situation, when both customary and treaty norms have the same content, both of them remain in force and are separately applicable, as the former shall not supersede the latter. Furthermore, as the International Court of Justice explained in the *Nicaragua case*, also in circumstances in which a reservation to a treaty provision that achieved customary status has been submitted, a customary rule operates unaffected by the State statement.[280] Conversely, the High Court of South Africa cited[281] a passage from the *Barcelona Traction case* in order to remind the litigants that awards of arbitral tribunals, including

273 *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 ICJ Rep. 4.

274 *Coplin v. US*, Claims Court, USA, 30 July 1984, 6 Cl. Ct 115 (1984), fn. 12.

275 *Jorgic case*, ¶ 40 mentioning *South West Africa cases* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, 1962 ICJ Rep. 319.

276 *Al-Dulimi v Federal Department of Economic Affairs, Education and Research*, Federal Supreme Court, Switzerland, 31 May 2018, BGer 2F_23/2016, ILDC 2962 (CH 2018), ¶ 3.2.

277 *Right of Passage over Indian Territory* (Portugal v. India), Preliminary Objections, 1957 ICJ Rep. 125 [*Right of Passage case*].

278 *Immigration Officer at Prague Airport case*, ¶ 23; *Mohamed case*, ¶ 164 and *Kiobel v. Royal Dutch Petroluem*, 623 F.3d 111, 139 (2nd Cir 2010), where, on the basis of the interrelation between treaty and customary norm analysis from the *North Sea Continental Shelf cases*, it was determined that an inclusion "in a handful of specialized treaties" of the corporate liability does not indicate its fundamentally norm-creating character and, therefore, there had been no customary rule in this regard yet established.

279 *Sryyy v. Minister for Immigration and Multicultural and Indigenous Affairs*, Federal Court, Australia, 17 March 2005, [2005] FCAFC 42, ILDC 981 (AU 2005), ¶ 32.

280 *Director of Immigration case*, ¶ 73 and *Jorgic case*, ¶ 16.

281 *Van Zyl case*, ¶ 82.

particularly those pertaining to the standard of treatment, "do not necessarily contain customary international law principles" and, consequently, no "generalization going beyond the special circumstances of each case" is warranted.

The *Corte Constitucional de Colombia* referred to the *Barcelona Traction case* in its discussion on the nature of peremptory norms in international law and their effect.[282] Similarly, the German Federal Constitutional Court consulted this decision in the *East German Expropriation case* to elucidate upon the nature of *jus cogens* norms and to provide certain examples in this regard. Accordingly, they

> are in the individual case not open to disposition by the states … These are rules of law which are firmly rooted in the legal conviction of the community of states, which are indispensable to the existence of public international law, and the compliance with which all members of the community of states may require … This relates in particular to provisions on the international maintenance of peace, the right of self-determination … fundamental human rights and central norms for the protection of the environment … Such public international law may not be excluded by the states either unilaterally or by agreement, but only altered by a later norm of general international law of the same legal nature.[283]

Consequently, peremptory norms shall be respected and complied with by all States, as they form *erga omnes* obligations in the opinion of the American federal court[284] following the same conclusion of the ICJ. In accordance with the *Barcelona Traction case*, the Iranian court explained that *erga omnes* commitments "are binding on all states and all states can be held to have a legal interest in their protection. Non-compliance with *jus cogens* norms creates liability toward the entire international community".[285]

Finally, the case-law of the International Court of Justice assists municipal courts in their considerations of conflicts between international and domestic rules. Thus, the *Headquarters Agreement Opinion* was not only referred to but also cited by the Constitutional Court of the Turkish Republic of Northern Cyprus in order to provide an authoritative statement on the status of international law in relation to domestic legal regimes. The Constitutional Court specified that in case of a conflict, international law shall prevail over municipal regulations. Furthermore, the interpretation directive derives from this principle that municipal law shall be interpreted and applied in such a way as to avoid a conflict with the international legal obligations of the Turkish Republic of Northern Cyprus.[286]

282 *Gallón Giraldo case*.

283 *East German Expropriation case*, ¶ C.I.1.c).

284 *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).

285 *Anonymous Infertile Couple v Public Court of Mazandaran*, Appellate Court, Iran, 11 April 2020, Case No 9709987413101184, ILDC 3149 (IR 2020), ¶ 6.

286 *National Unity Party v. TRNC Assembly of the Republic*, Constitutional Court, Turkish Republic of Northern Cyprus, 21 June 2006, Case no. D 3/2006, ILDC 499 (TCc 2006), ¶ 66.

3.2 Questions of fact

The fact-finding function is an inseparable task of every adjudication – on an international as well as on national level – as general and abstract norms are to be applied to concrete and practical situations. Hence, the ICJ Statue directly entitles the International Court of Justice to examine the factual background of each case. Article 36(2)(c) makes it clear that:

> [t]he states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement … the jurisdiction of the Court in all legal disputes concerning: …
>
> c. the existence of any fact

and further Article 53(2) stipulates:

> [t]he Court must … satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Also, the ICJ Rules require that both a judgment as well as an advisory opinion shall contain a statement of the facts of each case as a required element of each decision of the World Court.[287]

Statements of facts determined by the World Court are not only relevant in international dispute settlement but may also be of importance within municipal proceedings. In this context, domestic adjudicators discuss certain determinations of the ICJ as evidence of fact or the application of legal norms to actual circumstances and adopt them in their decision-making processes. Some scholars even argue that the doctrine of the issue preclusion, developed in common-law systems, should also be applicable as between the World Court and municipal courts.[288] Whatever the precise reason of the reliance on the fact-finding function of the ICJ by domestic adjudicators, it is a fact that warrants a detailed presentation. Additionally, such an approach is beneficial and practical as it is "[e]nabling courts to save precious time and resources by relying on the work of their judicial counterparts".[289]

In relation to the fact-finding function of the International Court of Justice and the reliance on factual determinations of the Court by domestic judges, a decision of the Supreme Court of Spain dated 20 November 2007 is of particular

287 ICJ Rules, art. 95(1) and Art. 107(2).

288 Reilly D.M., Ordonez S., *supra* fn. 4, pp. 459–60; Schulte C., *Compliance with Decisions of the International Court of Justice*, Oxford University Press 2004, chapter 2, fn. 283.

289 Shany Y., *One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?* [in:] *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, eds. Fauchald O.K., Nollkaemper A., Hart Publishing 2012, p. 24.

relevance.[290] The case relates to the status of statelessness of a Saharawi woman and its recognition in Spain. The Spanish court, on appeal, concluded that she could not obtain Spanish nationality, did not enjoy Algerian nationality, and could not be imposed on with Moroccan nationality. Consequently, Ms. Bourkari Dafa fulfilled all the criteria to be recognised as a stateless person. In reaching this conclusion, the Supreme Court explicitly referred to and extensively cited the *Western Sahara Opinion* highlighting that the region of the current Western Sahara was not *terra nullius* during the time of Spanish colonisation as it was inhabited by tribes and peoples with a social and political organisation. Furthermore, the municipal decision also implemented factual determinations of the ICJ in relation to the lack of legal relations amounting to territorial sovereignty between Western Sahara and the Kingdom of Morocco.

One category of cases in which national judicial organs examine and implement factual determinations of the World Court are territorial and boundaries disputes. When considering an appeal relating to the development of a certain oil field in Nigeria, the Court of Appeal of Texas dismissed the claims of a plaintiff, a Nigerian corporation, filed against another Nigerian corporation for want of personal jurisdiction. One of the bases for the lack of jurisdiction was the factual determination in the *Boundary between Cameroon and Nigeria case*, in which "the International Court of Justice ruled that part of the oilfield that includes OPL-230 belongs not to Nigeria but to Cameroon".[291] Then, the Norwegian fisheries limit was found by the Supreme Court of Norway[292] to accord with international law as determined in the *Fisheries case*. British sovereignty over the islets of Minquiers and Ecrehos, being part of the Channel Islands near the coast of France, as determined in the *Minquiers and Ecrehos case*, was recognised by the Court of Cassation of France.[293] Similarly, on the other side of the English Channel, the British court reached the same conclusion citing the same decision of the ICJ.[294] A debtor argued that although the Channel Islands were British, they did not form part of the United Kingdom. Nevertheless, the judge recognised that they fall within the jurisdiction of the UK in bankruptcy matters.

The US District Court for the District of Columbia relied extensively on determinations of the International Court of Justice in a dispute between Nicaragua and Colombia.[295] It utilised a map from the judgment of the ICJ to

290 *Bourkari Dafa v. Spain*, Supreme Court, Spain, 20 November 2007, Case no. 10503/2003, ILDC 1199 (ES 2007).

291 *Moni Pulo Limited v. Trutec Oil and Gas, Inc.*, Court of Appeals of Texas, USA, 130 S.W.3d 170, 174 (2003).

292 *Rex v. Cooper*, Supreme Court, Norway, 24 October 1953, 20 ILR 166: "There is a particular reason to strengthen the repression of infractions which have taken place since the Norwegian fisheries limit has been recognized in international law by the Hague Judgment of 1951".

293 *James Buchanan & Co. v. Société Hanappier-Peyrelongue et Cie*, Court of Cassation, France, 20 October 1959, 39 ILR 425, 426.

294 *In Re a Debtor, ex parte Viscount of the Royal Court of Jersey*, High Court of England and Wales, [1981] Ch. 384 (1980) after Reilly D.M., Ordonez S., *supra* fn. 4, pp. 472–3.

295 *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment 2012 ICJ Rep. 624.

discuss the maritime border between Nicaragua and Colombia around the San Andres Islands and took "judicial notice of the geography depicted in Map A and as explained in the ICJ's ruling".[296] The US court also remarked that the World Court determined that all islands in question, including Roncador, belong to Columbia and that a 12-mile territorial sea around that latter island is permissible under international law.

Within the realm of treaty law, decisions of the International Court of Justice assisted municipal courts in their conclusions as to the existence, validity, and termination of certain international agreements. Thus, American courts referred to the *Tehran Hostages case* in order to assess whether the "hostage crisis" had any impact on the validity and binding force of the US-Iran Treaty of Amity.[297] It was concluded, as the World Court indicated, that the treaty was still in force, despite serious international frictions and the severance of diplomatic relations. Then, the conclusion of the ICJ that the agreement of 1933 was merely a concessionary contract between a government and a foreign corporation rather than a treaty[298] enabled its recognition as such in Japanese[299] and Italian[300] courts. Finally, the Hungary-Czechoslovakia Treaty on the Gabčíkovo-Nagymaros Project was indicated by the Constitutional Court of Slovenia[301] as an example of a territorial treaty, pursuant to the same determination by the International Court of Justice,[302] in order to delimitate the difference between border agreements and agreements on the determination of the State border. Finally, while analysing Article 36 VCCR and the meaning of its "without delay" standard, the Supreme Court of Virginia[303] considered the period that lapsed between the arrest of a foreign national and the notification of his or her consular post. In the *LaGrand case*, this period amounted to more than 16 years as determined by the ICJ, so 36 hours in the *Bell v. Virginia case* was not regarded as a breach of the VCCR obligation.

296 *United States v Carvajal and Miranda*, District Court for the District of Columbia, United States 924 F Supp 2d 219 (DDC 2013), ILDC 2006 (US 2013), ¶ 16–19.

297 *Raji v. Bank Sepah-Iran*, 139 Misc.2d 1026, 1028 (N.Y. S. Ct. 1988) and *US v. Central Corporation of Illinois*, ---- F.Supp. --, 1987 WL 20129, fn. 2 (N.D. Ill. 1987).

298 *Anglo-Iranian Oil case*.

299 *Kaisha case*, p. 308: "[t]he Court will first proceed to consider the nature of the Concession Agreement entered into between the Persian Government and the Anglo-Persian Oil Company in 1933. One party to the Agreement was the Persian Government. The other party is not a Government but is the Anglo-Iranian Oil Company, a foreign corporation having its head office in England. It follows therefore that this Agreement is not an international treaty or an agreement similar to a treaty. It must be regarded as a private agreement entered into between the Government of a certain country and a foreign corporation, in connection with the right to extract oil … That interpretation is also expressed in the majority Judgment of the International Court of Justice of July 22, 1952". The decision was later upheld on the appeal, *see*: *Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha*, High Court of Tokyo, Japan, 1953, 20 ILR 312.

300 *S.U.P.O.R. case*, p. 41.

301 *Agreement between Slovenia and Croatia case*, fn. 3.

302 *Gabčíkovo-Nagymaros Project case*.

303 *Bell v. Virginia case*, at 187.

Furthermore, a determination as to the wrongfulness of acts of a State under international law by the International Court of Justice plays a special and distinct role as far as the fact-finding function of the World Court is concerned, particularly in relation to the reliance on such a determination by municipal courts.[304] Such a determination of itself is predominantly a question of fact, as an international adjudicator has first and foremost to examine acts that amounted to a breach. Generally, national judges treat a determined violation of international law as an issue already decided upon by a court of competent jurisdiction and do not relitigate the issue.

Firstly, the International Court of Justice declared the presence of South Africa in Namibia as illegal under international law,[305] once the UN General Assembly terminated the mandate over the territory. Municipal courts in Germany,[306] South Africa,[307] and the USA[308] explicitly acknowledged this determination. In the latter jurisdiction, the recognition of a breach by the ICJ was indicated to dismiss the action of an organisation representing South African interests due to the lack of standing and the presentation of a non-justiciable political question. Additionally, the US Court of Appeal explicitly relied on the conclusion of the World Court, firstly, that Serbia violated international law by failing to prevent the commitment of genocide, and, secondly, that Bosnian Muslims targeted in Srebrenica rather than "non-Serbs" constituted a "protected group" within the meaning of the *Genocide Convention*.[309] These facts were examined and considered by the American court in order to resolve whether the residents of Bougainville should be regarded as protected under the convention. In its own words, the decision of the ICJ, with its factual determinations, "serves as an instructive frame of reference". Similarly, relying on the *Bosnia Genocide case*, the Supreme Court of Israel confirmed that the events in Srebrenica in 1995 constituted the crime of genocide in an extradition proceeding concerning Aleksandar Cvetković, who allegedly participated in killings of Bosniaks.[310]

In the *Tehran Hostages case*, the International Court of Justice decided that Iran violated international law by not preventing the detention of the United States *Chargé d'affaires* and other diplomatic and consular staff. This factual determination was relied upon by American courts in their decisions concerning the aftermath of the Iran hostages crisis within the US internal judicial system. It served as a factual background in an action brought by former hostages seeking redress

304 *See*: Nollkaemper A., *Internationally Wrongful Acts in Domestic Courts*, 101 AJIL 777, fn. 488 (2007).

305 *Namibia Opinion*.

306 *East German Expropriation case*, ¶ C.I.2.b.cc).

307 *Basson case*, ¶ 195.

308 *United States-South West Africa/Namibia Trade and Cultural Council v. US Department of State*, 90 F.R.D. 695, 696 (D.D.C. 1981).

309 *Sarei II case*, ¶ 21.

310 *Cvetković v Attorney General*, Supreme Court as Court of Appeal, Israel, 29 November 2012, Crim A No 6322/11, ILDC 2096 (IL 2012).

in tort against Iran for damages suffered during and as a result of their Iranian captivity.[311] In another case, the wrongfulness on the side of the Iran authorities as indicated by the Court was referred to in order to deny a motion for a stay of proceedings.[312] During the trial seeking redress for a breach of contract by the government of Iran, Iran filed a relevant motion arguing that its counsels were prevented from obtaining information required for effectively representing their client in the case due to the travel ban between the USA and Iran imposed after the crisis. The court only underlined,

> [i]t is not without significance that the President's ban on travel and the closing of the Iranian embassy in the United States were provoked by actions of the Iranian authorities which would have been determined to be unlawful by the International Court of Justice.[313]

Similarly, another American federal court upheld as constitutional immigration regulations sanctioning deportation proceedings for a failure to comply with reporting requirements imposed on Iranian students.[314]

According to the reasoning of the Supreme Court of Israel, its *Mara'abe case* as well as the *Construction of a Wall Opinion* rested upon the common "basic normative foundation" recognising the Israeli presence in the West Bank as a belligerent occupation. Furthermore, the Israeli court agreed that a number of human rights of Palestinians living behind the fence were impeded. Consequently, the conclusion of the International Court of Justice indicating that the separation barrier had been erected in breach of international law was partially shared, as the court ordered the dismantlement of certain segments of the wall and its route alteration.[315]

Then, one of the Mexican nationals explicitly referred to in the *Avena case* petitioned an American federal court in order to seek redress for the violation of Article 36 VCCR. In the *Cardenas case*, the exact scope of violation of the defendant's rights needed to be established. Thus, the US Court of Appeals turned to the findings of the ICJ that, although "the United States had breached its obligation under article 36, paragraph 1(b), of the Vienna Convention by failing to inform Cardenas of his rights under this paragraph and by failing to notify the Mexican consular post of Cardenas' detention", no breach occurred under paragraph 1(c) of the Convention in Cardenas' situation. Such determination made the case distinguishable from cases of other Mexican nationals discussed in the *Avena case*, particularly from the *Medellin case*. It was mostly attributable to the fact that, as the World Court[316] established, competent Mexican authorities did

311 *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 584 (9th Cir. 1983).
312 *National Airmotive v. Government & State of Iran*, 491 F.Supp 555, 556 (D. D. C. 1980).
313 *Ibid.*, fn. 7.
314 *Narenji v. Civiletti*, 617 F.2d 745, 747–48 (D.C. Cir. 1979).
315 *Mara'abe case*, ¶ 57, 113–16.
316 *Avena case*, ¶ 106 (4).

learn of Cardenas' detention in time to assist him, but nevertheless refused to do so. "Cardenas thus fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest".[317]

As to the international mandate system, the Constitutional Court of South Africa[318] relied on the *Status of South West Africa Opinion* and the *Namibia Opinion* to recapitulate the legal and factual status of the territory of Namibia in history and to conclude that South Africa exercised political and military control over that territory despite the fact that its presence was declared unlawful under international law by the ICJ. Within the colonial context, the next municipal decision concerns the situation in East Timor. The factual finding from the *East Timor case* recognising the area as a non-self-governing territory was referred to by the Refugee Review Tribunal of Australia[319] to establish that the right of self-determination is applicable to its inhabitants.

As far as State succession and its effects on international law are concerned, the order on provisional measures in the *Bosnia Genocide case*[320] assisted the Federal Constitutional Court of Germany in concluding that the *Genocide Convention* is binding upon Bosnia and Herzegovina by the way of the succession after the disintegration of Yugoslavia, rather than accession.[321] Moreover, the determination of the World Court[322] as to the fact that Serbia is a successor under international law of the State Union of Serbia and Montenegro was recognised and adopted by the England and Wales High Court.[323]

The same English court did not share the argument of an appellant that he should have been afforded customary immunity *ratione materiae* due to his position as the head of the Office of National Security of Mongolia.[324] Consequently, the appeal was dismissed, and the defendant extradited to Germany. The judicial settlement of the *Criminal Mutual Assistance case* with its determination that the immunity under customary international law shall not be applicable to a Djiboutian *Procureur de la République* and Head of National Security assisted the court in reaching this conclusion.

Interestingly, the US Court of Appeals in making its argument relating to the procedural issues, referred to the *Tehran Hostages case* as an example. In that international case, the order on provisional measures *pendete lite* as well as the final judgment contained analogue operative parts obligating Iran to release

317 *Cardenas case*, at 254.
318 *Basson case*, ¶ 195–7.
319 *Case no. N93/00294*.
320 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia), Provisional Measures, Order, 1993 ICJ 3.
321 *Jorgic case*, ¶ III.3.b.aa.
322 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, 2008 ICJ Rep. 412.
323 *Imagesat case*, ¶ 36–7.
324 *Bat case*, ¶ 55–62.

detained diplomatic and consular staff immediately. The American court concluded on that basis that "sometimes preliminary and final relief may coincide in content".[325]

Finally, the US District Court for the Southern District of New York explicitly and directly incorporated into its decision in the *US v. PLO case*[326] certain factual determinations reached by the ICJ in the *Headquarters Agreement Opinion*. It observed:

> United States representatives to the United Nations made repeated efforts to allay the concerns of the U.N. Secretariat by reiterating and reaffirming the obligations of the United States under the Headquarters Agreement. A chronological record of their efforts is set forth in the advisory opinion of the International Court of Justice, *U.N. v. U.S., supra*, 1988 I.C.J. 12, ¶¶ 11–22, at 16–22 (April 26, 1988).

The same court repeated the determination from the *Oil Platforms case*[327] that the recourse to armed force by the United States in the circumstances of the case did not constitute the exercise of the right to self-defence.[328]

3.3 Municipal courts distinguishing between ICJ conclusions and cases at hand

In order for any dialogue, and meaningful inter-judicial dialogue in particular, to be productive and beneficial for its participants and the legal system, a lack of full consensus is unavoidable. The collision of arguments, opinions, and attitudes finally leads to the development of a comprehensive, coherent, and widely accepted answer to a legal question. Therefore, infrequent disagreement with the International Court of Justice on the side of municipal courts should not be surprising. In fact, it occurs rather sporadically, and even in such situations national judges engage in a lengthy explanation and distinguish between a decision of the ICJ and a situation they are called upon to adjudicate. These differences predominantly derive from a dissimilar factual background, another legal framework of an issue, or an error on the side of a party invoking a ruling of the World Court as instructive to circumstances at the domestic level. Instances of direct confrontation with the International Court of Justice reasoning by domestic adjudicators are exceptionally rare.

Cases in which municipal courts find a decision of the ICJ not compelling and provide a different resolution of a legal issue or problem should not be assessed negatively. In fact, it is another form of inter-judicial dialogue between the World

325 *LTD Commodities, Inc. v. Perederij*, 699 F.2d 404, 406 (11 Cir. 1983).
326 *US v. PLO case*, at 1467.
327 *Oil Platforms* (Iran v. USA), Judgment, 2003 ICJ Rep. 161.
328 *In re 650 Fifth Avenue and Related Properties*, 777 F.Supp.2d 529 (S.D.N.Y. 2011), fn. 16.

Court and its municipal counterparts. Yet, in order to distinguish an international case from a domestic one, national adjudicators need to examine an international decision and assess its relevance and the clarity and authority of arguments as well as providing reasons for not following it. All these elements are present in municipal judicial decisions and, accordingly, rulings of the International Court of Justice do not remain irrelevant and unknown to municipal courts.

An interesting observation in relation to the case-law of the ICJ and the reference to it by parties before municipal courts was made by the Hong Kong Court of Final Appeal at the beginning of its discussion relating to the core legal matter of a dispute at hand, that is State immunity:

> [a] large body of cases and writings has been cited. Much of it is helpful. Some of it, once the statements therein are read in context, turns out not to bear upon anything with which the present case is concerned. Falling into this latter category is, for example, the advisory opinion of the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* 1999 ICJ Rep 62. As its name suggests and its contents confirm, that matter is not concerned with state immunity. It is concerned with the immunity that a special rapporteur needs in order to perform his or her task.[329]

This passage clearly indicates that not only parties but similarly courts as well are called upon to become acquainted with the jurisprudence of the World Court and to position themselves in relation to it.

Furthermore, a stimulating discussion between the jurisprudence of the International Court of Justice and the perception of State immunities of national judicial bodies may be found in the ruling of the *Cassazione* rendered before the *Jurisdictional Immunities case*. The highest Italian Court observed that:

> [t]he International Court of Justice, in its 14 February 2002 judgment in the dispute between the Democratic Republic of Congo and Belgium, clarified the rationale and the content of the rule regarding the immunity of States from criminal jurisdiction … What appears relevant for our present analysis is the reasoning which the Court employed to confirm the existence of an international norm of State immunity. According to the Court, an international customary rule required immunity for Foreign Ministers to ensure the effective fulfilment of their duties and to protect them from any act by another State that could impair the performance of their tasks. In essence, such a norm precluding the exercise of jurisdiction made it possible to discharge duties that promote the reciprocal interests of States and the interests of the Community of nations. This definition of the international customary norm expresses a conception of immunity altogether different from the notion of a

329 *DRC v. FG HA LLC case*, ¶ 5.

> dichotomy between *acta jure imperii* and *acta jure gestionis*, the latter vision being linked to a principle of equality among States, according to the maxim of *par in parem non habet imperium*. The theories that justify immunity on the basis of the principle of equality among States envisage an absolute shield of immunity which in reality, as the American experience demonstrates, never existed. This absolute vision is an abstract one that depicts the international space as a space that is empty, rather than as one of cooperation. But in recent decades, we have witnessed an ever-advancing construction of supranational norms designed to respect and protect human rights.[330]

This approach of the ICJ was juxtaposed with the hierarchical theory or the normative hierarchy doctrine. The Court of Cassation explained that the latter allows its position to be distinguished from that of the World Court and, consequently, it preceded with the enforcement of foreign judgments in Italy due to the limits of State immunities relating to serious human rights violations.

Then, confronted with the jurisprudence of the ICJ in the argumentation of the parties, the US Supreme Court felt compelled to indicate the difference between the *Tehran Hostages case* and the case at hand, while examining the arbitrary detention and its prohibition under international law,

> The *Iran case*, in which the United States sought relief for the taking of its diplomatic and consular staff as hostages, involved a different set of international norms and mentioned the problem of arbitrary detention only in passing; the detention in that case was, moreover, far longer and harsher than Alvarez's.[331]

Thus, the US Supreme Court did not recognise the prohibition of arbitrary detention in the broad meaning as argued by Alvarez. Furthermore, the US Court of Appeals, Sixth Circuit, confronted with the question of whether international law prohibits capital punishment, joined the negative conclusion of other US courts in this regard. In passing, the court referred to the *LaGrand case*, to stress that its "holding was limited to the issue of consular protection and did not discuss whether the imposition of the death penalty violates international law".[332]

Moreover, the England and Wales High Court was called upon to analyse the *Namibia Opinion*, when confronted with the submission presented by Al-Jedda that UN Security Council Resolution no. 1546 should be interpreted in a way that does not warrant departure from the fundamental rights as indicated in the UN Charter. Nevertheless, after the discussion of the conclusions reached by the International Court of Justice, the learned judges determined that they did

330 *Prefecture of Vojotia case*, ¶ 40.
331 *Sosa v. Alvarez-Machain*, 542 US 892 (2004), fn. 27.
332 *Buell case*, fn. 11.

"not find *Namibia* of assistance"[333] as the ICJ did not establish in its decision an interpretative directive but only highlighted goals of the underlying UN Security Council resolution.[334]

Similarly, the UK Court of Appeal, while considering the bar of non-justiciability in a dispute between a foreign State and an investor originating initially from a bilateral investment treaty, resolved to distinguish a case brought before it by Ecuador[335] from the *East Timor case*. A counsel of a company advanced the argument of non-justiciability by reference to the decision of the ICJ on the basis that the underlying legal instrument of a claim is an international treaty concluded between two sovereign States and the British court is called upon to construe its meaning without the participation in the proceedings of one of them. This assertion was rejected, as

> the position is clearly quite different where, as here, a Treaty between two States makes clear that an investor national of one of the States may pursue direct rights against the other, without the involvement, presence or even consent of his own national State. Where the Treaty contemplates and provides for dispute resolution means of this nature, the principle of international law to be found in the *East Timor Case* cannot help in either international or national law to identify whether or when a national court may appropriately exercise a supervisory jurisdiction provided by the relevant procedural law.[336]

The same court did not agree with a submission of one of the parties that pursuant to the *Nuclear Weapons Opinion* the maintenance of nuclear weapons is in conflict with international obligations.[337] It was rather noted that the International Court of Justice could not reach a decisive conclusion in this regard.

The federal district court noted in the *Nestle case* that the International Court of Justice in the *Bosnia Genocide case* did not stipulate the elements of *mens rea* of aider and abettor of the crime of genocide. Consequently, no international standard in this regard exists and "the appropriate definition remains subject to

333 *R. (On the Application of Al-Jedda) v. Secretary of State for Defence*, England and Wales High Court of Justice, Queen's Bench Division, 12 August 2005, [2005] EWHC 1809 (Admin), ILDC 202 (UK 2005), ¶ 105.

334 *Ibid.*, ¶ 107–8: "It is plain that the court was not adopting an approach similar to that of the United Kingdom courts which interpret a statute in accordance with the principle in Simms. It was merely pointing out that since the object of Resolution 276 was to promote and not to undermine human rights in Namibia, member states, in abstaining from reliance on bilateral treaties, were enjoined not to do so in a way which would undermine the restoration of human rights within Namibia".

335 *Occidental Exploration case*.

336 *Ibid.*, ¶ 43.

337 *Marchiori v. Environment Agency*, [2002] EWCA Civ 03, ILDC 241 (UK 2002), ¶ 46–7: "In my judgment nothing in the *Advisory Opinion* supports Mr Fordham's contention that the UK's policy on Trident, as explained in the SDR, is repugnant to humanitarian principles of international law".

reasonable debate".[338] Likewise, the *LaGrand case* was not conclusive for the High Court of Singapore in its determination of the alleged breach of a detainee's rights under Article 36 VCCR. It observed, "the accepted time [to notify a consular post] was not considered by the Court as the United States accepted that there was a breach of Art. 36(1)".[339] Furthermore, the issue of the domestic enforceability of rights envisaged in Article 36 VCCR could not be addressed under the *LaGrand* and *Avena cases*, according to the High Court of New Zealand, as those decisions of the World Court did not concern this matter, but rather focused on the reciprocal rights and obligations of State parties to VCCR vis-à-vis each other.[340]

In relation to the *Arrest Warrant case*, the Constitutional Court of Spain clearly stated that

> it must be concluded that this cannot be employed as a precedent of the supposed restrictions on universal competency, as it limited its scope to the issue of whether or not international rules of personal immunity had been violated, while not pronouncing on universal jurisdiction with regard to genocide.[341]

Therefore, the restrictive approach to the principle of universal jurisdiction adopted by the Spanish Supreme Court on the basis of the decision of the ICJ was not warranted and a judgment of the latter was annulled. Likewise, the Hague Court of Appeal refused to rely on the *Arrest Warrant case* as the International Court of Justice was limited in its ruling by the *ultra-petita* rule only to a personal immunity matter under international law[342] rather than the universal jurisdiction principle. Later, as to the immunities under international law, the Italian Court of Cassation polemicised with the decision of the ICJ in the *Criminal Mutual Assistance case* giving witness to the persistent validity of the principle of immunity from civil jurisdiction for acts *jure imperii*. The *Cassazione* found that in this restrictive approach a break may be found as a new customary rule is in the process of being formed intended

> to limit the immunity from civil liability of a foreign State, whose organ, while exercising a *jure imperii* activity … has, however, made itself the author of acts of such severity so as to "undermine the very foundations of

338 *Doe v. Nestle S.A.*, 748 F.Supp.2d 1057, 1083 (C.D. Cal. 2010) [*Nestle case*]. The legal issue considered centred on the matter of whether an aider and abettor shall share or know *dolus specialis* of a perpetrator.

339 *Public Prosecutor v. Nguyen*, 20 March 2004, [2004] SGHC 54, ILDC 598 (SG 2004), ¶ 40.

340 *Zhang case*, ¶ 27.

341 *Menchú v. Two Guatemala Government Officials*, Constitutional Court of Spain, 26 September 2005, ILDC 137 (ES 2005), ¶ 6.

342 *H. v. Public Procurator case*, ¶ 5.4.3.

co-existence between peoples", which can therefore constitute "international crimes".[343]

The most articulate, convincing, substantive but also harsh disagreement with an ICJ decision came, however, from the Supreme Court of Israel, both in terms of the legal issues (although of minor character) and the factual basis of the decision.[344] At the beginning, it needs to be stressed that the *Construction of a Wall Opinion* as an advisory opinion is in no respect binding on States or any other subjects of international law. Furthermore, it does not enjoy the status of *res judicata* under international law, not to mention internal legal orders. Nevertheless, the Israeli court recognised that it should be afforded the full appropriate weight.[345]

As far as legal issues relating to the construction of the fence are concerned, two particular conclusions of the World Court faced the criticism of the Israeli highest court. Firstly, the International Court of Justice resolved that the scope of applicability of the *Hague Regulations* rule allowing for property destruction under the principle of military necessity (Regulation 23(g)) is limited only to the situation of hostilities and as such is irrelevant to the state of occupation.[346] The Supreme Court was of the opposite opinion as Regulation 23(g) should apply analogously to the belligerent occupation as proposed by Pictet,[347] and additionally the character of the military occupation supports such a solution. Generally, it is rather a fluid situation, where "[p]eriods of tranquillity and calm transform into dynamic periods of combat". Consequently, the erection of the fence would be understood as a defensive measure.

Secondly, the International Court of Justice considered the right of self-defence as envisaged in Article 51 of the UN Charter and rejected the possibility that this right may justify the fence construction. The ICJ made it clear that self-defence may be invoked only in case of an attack by another State, but terrorism attacks, against which the fence was erected, were not international but originating from the territory controlled by Israel.[348] "This approach", according to the Israeli Supreme Court, "is not indubitable" and "hard to come to terms with" as it is not supported by the literal interpretation. Also, from the teleological perspective this understanding should be rejected as "it is doubtful whether it fits the needs of democracy in its struggle against terrorism".[349]

Besides these legal discrepancies in two minor matters, the Supreme Court of Israel explicitly stated that the "basic normative foundation upon which the ICJ

343 *Lozano v. Italy*, Court of Cassation, Italy, 24 July 2008, Case no. 31171/2008, ILDC 1085 (IT 2008), ¶ 6.
344 *Mara'abe case*, ¶ 57–74.
345 *Ibid.*, ¶ 56.
346 *Construction of a Wall Opinion*, ¶ 124.
347 *Commentary. IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ed. Pictet J.S., ICRC, 1958, p. 301.
348 *Construction of a Wall Opinion*, ¶ 139.
349 *Mara'abe case*, ¶ 23.

and the Supreme Court … based their decisions was a common one".[350] It was the approach of the ICJ in handling the factual background and circumstances of a legal controversy concentrating upon the fence or wall that was distinguished from and opposed with the different approach of the Israeli court. The *Construction of a Wall Opinion* drew its factual basis primarily and predominantly from reports submitted by the UN Secretary-General, but the Supreme Court was presented with submissions and evidence from the State of Israel and petitioners directly affected by the fence. "Despite the fact that the data which each court received regarded the same wall/fence, the difference between each set of data is deep and great. This difference is what ultimately led to the contrary legal conclusions".[351] These differences were manifest in several ways.

Firstly, on one hand, the security-military necessity aspect of the fence erection was argued extensively before the Israeli court in relation to terrorist activities originating from the Palestinian territories. On the other hand, the discussion of this matter by the ICJ was rather disappointing. The statement submitted to the Court by Israel discussed the relevant data pertaining to the terrorism and its effects, but they were not mentioned or discussed whatsoever in the advisory opinion. Furthermore,

> [t]his minimal factual basis is manifest, of course, in the opinion itself. It contains no real mention of the security-military aspect. In one of the paragraphs, the opinion notes that Israel argues that the objective of the wall is to allow an effective struggle against the terrorist attacks emanating from the West Bank. That's it.[352]

It was also observed by the Supreme Court that the *Construction of a Wall Opinion* focused its factual determinations solely on the matters pertaining to the impingement of rights of Palestinian residents and omitted any facts constituting the justification for those violations rooted in the security-military necessity basis.

Secondly, despite the fact that infringements of rights of the residents of Palestinian origins "stood at the foundation of both judgments", their scope was different. The Supreme Court noted that the facts presented in the documents submitted by the UN Secretary-General, on which the ICJ based its determinations, were "far from precise" and some contradictions even between different documents could be identified.[353] This conclusion particularly relates to the scope of the property seizure, the separation of Palestinian residents from the rest of the West Bank, the annexation of the aquifer system, and the situation of the city of

350 *Ibid.*, ¶ 57. In his separate opinion Vice President M. Cheshin concluded that "[w]e have seen that there are no essential disagreements between us and the ICJ on the subject of law, and that is fortunate", at ¶ 2.

351 *Ibid.*, ¶ 61.

352 *Ibid.*, ¶ 63.

353 *Ibid.*, ¶ 67.

Qalqiliya.[354] The injured residents did not appear before the International Court of Justice and, consequently, could not produce relevant evidence. Similarly, the State of Israel did not participate in the proceedings. "There was no adversarial process, whose purpose is to establish the factual basis through a choice between contradictory factual figures".[355]

Thirdly, the World Court resolved to handle the wall in its entirety, probably owing to the fact that evidence submitted did not examine different segments thereof in a detailed fashion. Consequently, no precise determination as to the injury to a local population was possible. The ICJ provided some rather general conclusions in this regard. In contrast, the Supreme Court of Israel in its jurisprudence has been assessing separately parts of the fence taking into account particular circumstances, including topography, security arguments, infringements of local residents' rights, and their inconveniences. On this basis, it orders whether the proposed route of the wall is justified or not.

> There are, of course, other segments of the fence, whose location lands a severe blow upon the local residents. Each of these requires an exacting examination of the essence of the injury, of the various suggestions for reducing it, and of the security and military considerations. None of this was done by the ICJ, and it could not have been done with the factual basis before the ICJ.[356]

In the opinion of the Supreme Court of Israel, with which it is hard not to agree:

> [t]he difference between the factual bases upon which the courts relied is of decisive significance. According to international law, the legality of the wall/fence route depends upon an appropriate balancing between security needs on the one hand and the impingement upon the rights of the local residents on the other … As a result of the factual basis presented to the ICJ, full weight was placed on the rights-infringement side; no weight was given to the security-military needs, and therefore the questions of the proportionality of the impingement or of the margin of appreciation were not discussed at all. The

354 In regard to the situation in this city, a conclusion of the Supreme Court of Israel relating to the health care may be cited in order to illustrate the differences in the approach to the fact-finding function of both courts: "The ICJ's opinion held, on the basis of the Secretary-General's report, that as a result of the building of the wall, a 40% drop in caseload at the UN hospital in Qalqiliya had been recorded. From a graph submitted to us by the State it appears that the number of hospitalization days in 2004 is higher than that of 2002. The conclusion is that it cannot be said that the separation fence brought to a decrease in the number of hospitalized patients. The graph also shows that in 2003 there was a considerable rise in the number of beds in hospitals. In addition, a new private hospital was opened in Qalqiliya in 2003, and the Palestinian Authority also opened a hospital in 2002. In the opinion of the State, it is reasonable to assume that the opening of the new hospitals affected the caseload of the UN hospital in Qalqiliya".

355 *Mara'abe case*, ¶ 69.

356 *Ibid.*, ¶ 70.

result was the ICJ's conclusion that Israel is violating international law. The different factual bases led to different legal conclusions.[357]

Nevertheless, despite some criticism in the *Mara'abe case* and significant differences, the Supreme Court of Israel did engage in inter-judicial dialogue. It refused to reject the *Construction of a Wall Opinion* altogether, but rather chose to discuss it extensively and recognise its "full appropriate weight" in relation to the determination on the point of law. It did not, however, share the World Court's factual conclusions,[358] but provided convincing argumentation for a different approach. Moreover, it is often indicated in the international legal scholarship that international tribunals are not adequately equipped to conduct independent fact-finding, particularly in such controversial and complex matters. This is even more troubling in the advisory proceedings before the ICJ, where there are no parties assisting the Court in this regard by providing relevant, often contradictory, evidence and data.

3.4 Status of ICJ decisions in the jurisprudence of municipal courts

As developed on previous pages, municipal courts indeed refer to the jurisprudence of the International Court of Justice, mostly for normative reasons. Therefore, they engage in this particular aspect of the inter-judicial dialogue, as the volume of identified references is quite impressive. Nevertheless, national adjudicators rather rarely elucidate the status of decisions of the World Court in their respective domestic legal orders. Notwithstanding, those infrequent explanations are illuminating as they recognise the authority of the ICJ within international legal systems and give considerable weight to rulings of the International Court of Justice. They are also a symptom of the willingness of national courts to become more involved in the inter-judicial dialogue vis-à-vis the Court. Finally, deliberations of municipal judges, even if brief, serve as evidence of the attitude of the domestic judiciary towards international decisions. This is of particular importance, as relevant constitutional or even statutory norms hardly ever exist in national legal systems that regulate the status of rulings of international courts in those systems.

The Supreme Court of Canada characterised the jurisprudence of the International Court of Justice as compelling[359] and agreed that international rules inscribed in treaties may be developed by ICJ decisions. In the same vein, the

357 *Ibid.*, ¶ 68.

358 Even those commentators that do not agree that the fight against terrorism argument was not taken into account by the International Court of Justice, nevertheless share the opinion that the reasoning of the ICJ in this respect was not transparent, *see*: Dubuisson F., *The Implementation of the ICJ Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, XIII Palestine YIL 27 (2005), p. 36.

359 *Pushpanathan case*, ¶ 67.

Supreme Court of Spain[360] recognised that a ruling of the World Court may possess the quality of a precedent, directly referring to the *Right of Passage case*. In the opinion of the US District Court for the Central District of California the *Bosnia Genocide case* was counted among the most significant authorities in regard to the crime of genocide due to the eminence of the World Court as "the central expositor of international law"[361]. Likewise, the Supreme Court of Appeal of South Africa acknowledged that in the absence of a binding treaty, other international instrument, or an established State practice, "one looks to the decisions of international courts for guidance".[362] Despite expressing certain criticism in relation to the *Jurisdictional Immunities case*, the Court of Cassation concluded that "it has to take the ICJ judgment into account, both for its authoritativeness and because it is quite persuasive, while the Court of Cassation position is not shared by other European Courts and Tribunals".[363]

Quite differently, the Court of Appeal of the International Tribunal for Tangier Zone refused to treat decisions of the ICJ as precedents.[364] Although they are not binding in municipal courts, those rulings should offer "inspiration and guidance". Furthermore, they "cannot have an obligatory character on individuals who might litigate on similar matters".[365] Additionally, the US Court of Appeals determined that private parties do not have "a cause of actions in an American court to enforce ICJ judgment".[366] The American court found that international decisions neither enjoy the status of *jus cogens* nor form legal standards of review of agency actions.

In this regard, the approach of the Tribunal of Florence to decisions of the International Court of Justice needs more detailed examination. The Italian court concluded,

> while the *giudicato interno* [the ruling of the Italian Court of Cassation on the preliminary issue of jurisdiction] crystallizes a compulsory principle for the parties, the ICJ decision does not have any direct effect for the parties, but it is compulsory for the judge, as a State organ.

Furthermore, it

> does not operate at the same level of the Court of Cassation, that interprets the law; it is rather constitutive of the law. The ICJ decision is equivalent, thanks

360 *Exequatur case*, ¶ 5.
361 *Nestle case*, at 1083.
362 *Minister of Justice and Constitutional Development and ors v The Southern African Litigation Centre*, Supreme Court of Appeal, South Africa, [2016] ZASCA 17, ILDC 2533 (ZA 2016), ¶ 70.
363 *Albers case*, ¶ 5; translation after Nesi G., *The Quest for a 'Full' Execution of the ICJ Judgment in Germany v. Italy*, 11 J. of International Criminal Justice 185, 191 (2013).
364 *Mackay Radio and Telegraph Company v. Lal-La Fatma Bent si Mohamed El Khadar*, Court of Appeal of the International Tribunal for Tangier Zone, Morocco, 13 August 1954, 21 ILR 136.
365 *Ibid.*, p. 137.
366 *Committee v. Regan case*, at 934.

> to its insertion in the internal legal order, to a *jus superveniens* that, while not impinging upon the private relationship debated in court, has immediate and compulsory effect on the margin of appreciation of the judge.[367]

Consequently, the Italian court changed the perspective from the assessment of a cause of action of a private party to the consideration of obligations of a national judge confronted with an international decision and determined that it constitutes a *jus superveniens*.

Probably the most explicit consideration of the status of a decision of the International Court of Justice within the domestic legal system came from the Constitutional Court of Hungary.[368] It was requested to adjudicate upon the position of a judgment rendered in the *Gabčíkovo-Nagymaros Project case*, when a Hungarian parliamentarian petitioned the court to rule on the obligation of the Hungarian Parliament to adopt a statute implementing the judgment of the ICJ. In addressing the problem, the Hungarian decision focused predominantly on the nature of obligations that might stem from a ruling of the International Court of Justice. It concluded that those obligations had not become part of domestic law as they were neither generally recognised principles of international law nor rooted in any treaty provision. Consequently, the decision of the ICJ was considered as merely a resolution of a specific inter-State dispute and as such it created only obligations within the international sphere. The jurisdiction of the Court confers on it the competence neither to annul internal norms, nor to impose a duty on the legislature as to the adoption of a statute of a predefined content. Despite those considerations, the Constitutional Court of Hungary acknowledged that rulings of the ICJ may "gain theoretical content or the value of a precedent".[369]

Additionally, an interesting reflection as to the status of advisory opinions of the ICJ within an internal domestic legal system is provided in the *Mara'abe case*. It was initiated by petitioners seeking the demolition of the separation fence that was recognised as illegal under international law by the World Court in the *Construction of a Wall Opinion*. The Israeli court at the beginning reminded in its decision that advisory opinions are merely advisory in nature, do not bind any states or even organs requesting them, and, thus, do not enjoy the *res judicata* status. Nevertheless, it was found that "the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law". Consequently, "[t]he ICJ's interpretation of international law should be given its full appropriate weight".[370] Against this conceptual background, the Supreme Court explained in its decision why the opinion of the ICJ was not followed in its entirety. It pointed to two main categories of dissimilarities that had a bearing on the final decision. Firstly, the differences in the

367 *Toldo case*, after Nesi G., *The Quest for a 'Full' Execution of the ICJ Judgment in Germany v. Italy*, 11 J. of International Criminal Justice 185, 189 (2013).

368 *Re Member of Parliament*, Constitutional Court, Hungary, 7 October 2003, ILDC 601 (HU 2003).

369 *Ibid.*, ¶ 3.3.

370 *Mara'abe case*, ¶ 56.

factual background were highlighted, especially dealing with the security-military necessity and the scope of the local inhabitants' rights violation. Secondly, as far as procedural issues were concerned, the Israeli court observed that neither injured parties nor the State of Israel had participated in the advisory proceedings before the ICJ and, consequently, had not presented their arguments and evidence supporting them.

The Consular triad and its repercussions within the American system of justice required US courts to address the matter of the status of decisions of the ICJ. In the *Breard v. Greene case*, the US Supreme Court determined that American judicial institutions should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such". Simultaneously, however, the court denied a stay of execution despite the fact that the proceedings before the ICJ were pending. With this in mind, a remark by Paulus that the respectful consideration standard "amounted, in practice, to an exercise in inconsequential politeness"[371] seems to be ironically true.

Later, the *LaGrand case* decided by International Court of Justice was received rather positively by American courts. The *Madej case*[372] ordered to resentence Madej as it recognised the *LaGrand* judgment "among the most important developments defining the treaty obligations of signatories to the Vienna Convention". Further, the district court determined that

> [w]hile the I.C.J. interpretation of the interplay between the procedural default doctrine and the Vienna Convention is binding when considering an individual violation, the aspects of their holding that pertain more closely to the issue between nations do not control the dispute before this Court.[373]

In seems that the American court in this *dictum* acknowledged the compelling authority of the International Court of Justice in relation to legal matters, including the interpretation of international instruments, leaving aside their application to factual patterns of actual disputes between States. Next, it was also acknowledged that the ICJ interpretation of VCCR was binding on the USA and its courts as a matter of federal law.[374]

Subsequently, the US Supreme Court was confronted with yet another ICJ decision – the *Avena case*. It repeated in *Sanchez-Llamas v. Oregon*[375] the standard of

371 Paulus A.L., *From Neglect to Defiance? The United States and International Adjudication*, 15 EJIL 783, 804 (2004).

372 *Madej case*, at 978.

373 *Ibid.*, at 980.

374 *US ex rel. Madej v. Schomig,* --- F.Supp.2d --- (N.D. Ill. 2002), 2002 WL 31386480, at 1: "This interpretation of the Convention is binding upon the United States and this Court as a matter of federal law due to the ratification of the Optional Protocol". Nevertheless, this enthusiastic approach had not been shared by all courts in the United States, as many followed rather restrictive attitude of the US Supreme Court, *see*: *Valdez v. State of Oklahoma*, 46 P.3d 703 (2002).

375 *Sanchez-Llamas v. Oregon*, 548 US 331 (2006).

"respectful consideration" found in the *Breard case* but reaffirmed that domestic procedural laws control the implementation of international treaties – including the procedural default rule. The court noted "nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts", particularly in light of the fact that decisions of the ICJ are not formally precedents to the Court itself. The judgment in the *Avena case* could not enjoy "decisive weight", as the jurisdiction of the World Court had been renounced by the USA in relation to VCCR. The *Sanchez-Llamas case* was further followed by lower courts as binding.[376]

In relation to the Consular triad, the perception of decisions of the ICJ within the municipal regime by American courts may be confronted with the understanding of their status by the Federal Constitutional Court of Germany. It concluded in its *German Consular Notification case*[377] that the principle of friendliness towards international law (*Völkerrechtsfreundlichkeit*) inscribed in the German Constitution should be applicable as well to judgments of international courts. Thus, in order to avoid violations of international law, State parties to VCCR ought to respect interpretations rendered by the ICJ, also in proceedings between third parties. Consequently, rulings of the World Court enjoy the status of *de facto* precedents. It was also acknowledged that ICJ's interpretations of international agreements enjoy a normative guiding function (*normative Leitfunktion*).[378] In fact, the Federal Constitutional Court equalled the effect of the jurisprudence of the European Court of Human Rights and the World Court within the internal legal system of the Federal Republic of Germany attributing to these two sets of the international case-law the same normative guiding function in relation to treaty interpretation.[379]

The German Federal Constitutional Court determined additionally that there exists a direct constitutional obligation on the side of municipal courts to take

376 *Ex parte Medellin*, Court of Criminal Appeals of Texas, 223 S.W.3d 315 (2006); *Commonwealth v. Judge*, 591 Pa. 126 (S.Ct. Penn. 2007).

377 It is worth mentioning that the Federal Republic of Germany was a party to the *LaGrand* proceedings before the ICJ and was bound by the ruling under Article 94(1) of the UN Charter and Article 59 of the ICJ Statute in the same respect, as were the USA.

378 *German Consular Notification Case*, ¶ 62: "*If the duty of respectful consideration of the precedents of the International court of Justice were to* be limited to those cases in which Germany participated, it would not be possible to prevent conflict from arising regularly between the international law obligations of the Federal Republic of Germany and domestic law in the context of the de facto precedence of its decisions … The interpretation of an international treaty by the International Court of Justice must therefore be given a normatively guiding function that goes beyond individual cases, and which the contracting parties would have to observe. A prerequisite for such an interpretation is that the Federal Republic of Germany is party to the relevant international treaty containing the prerequisites of substantive law in question and had subjected itself to the jurisdiction of the International Court of Justice – whether it be compromissory, as in the case of the optional protocol to the Consular Convention, o through its optional declaration" – translation after: Tams Ch. J., *German Consular Notification case*, Federal Constitutional Court, Germany, 19 September 2006, Case no. 2 BvR 2115/01, ILDC 668 (DE 2006).

379 *German Consular Notification case*, ¶ 55 and 62.

notice (*verfassungsunmittelbare Pflicht zur Berücksichtigung*) of decisions of the International Court of Justice.[380] It concluded straightforwardly:

> [i]t results from the interplay of the compulsory jurisdiction of the International Court of Justice in the field of consular rights, the limited substantive legal force of its decisions, the status of the Federal Republic of Germany as a party to the Consular Convention and the Optional Protocol as well as the national implementation of those agreements, that national courts are obligated to take into consideration decisions of the International Court of Justice delivered in the field of consular rights in concrete litigations against the Federal Republic of Germany. This result follows necessarily from the constitutional commitment of the German authorities to international treaties concluded by the Federal Republic of Germany as interpreted by the competent international jurisdiction.[381]

Probably the most ICJ-open understanding of the status of World Court's decisions in a domestic legal regime was expressed by the Court of Appeals of Turin in the *De Guglielmi case*. That court addressed the matter of the internal effect of the *Jurisdictional Immunities* judgment on the municipal court proceedings. It found that in light of Articles 10 and 11 of the Italian Constitution and in connection with Article 94 of the UN Charter and Article 59 of the ICJ Statute, ICJ decisions are binding on Italy as a State and on the court as its organ.[382] As the judgment rendered by the World Court against Italy and in favour of Germany precluded the jurisdiction of Italian courts in civil damage cases due to German jurisdictional immunities, "it does not appear possible to examine the merits of the dispute, which would be in violation of the ruling of the International Court of Justice",[383] which constituted "a substantial innovation that significantly alters the evaluation framework".[384] Therefore, the Turin Court found the case inadmissible.

The status of decisions rendered by the International Court of Justice was examined once again within American federal jurisdiction in the *de los Santos Mora case*.[385] Unlike in other American cases discussed and pertaining to the Consular triad, this case was a civil action under the Alien Tort Statute for damages for violation of the plaintiff's rights under Article 36 VCCR. The US Court

380 In the case at hand, the *Budesverfassungsgericht* found that the Federal Court of Justice "has interpreted Art. 36 VCCR in a more restrictive manner than the International Court of Justice in cases *LaGrand* and *Avena* without sufficiently dealing with this case-law", *German Consular Notification case*, ¶ 63. This obligation was reaffirmed in subsequent decisions of the Federal Constitutional Court, e.g., *Case no. 2 BvR 1579/11*, ¶ 11; and *D. v. Germany*, Federal Constitutional Court, Germany, 8 July 2010, 2 BvR 2485/07, ILDC 1557 (DE 2010).

381 *German Consular Notification case*, ¶ 60.

382 *De Guglielmi case*, ¶ 14.

383 *Ibid.*, ¶ 19.

384 *Ibid.*, ¶ 18.

385 *De los Santos Mora v. New York*, 24 April 2008, 524 F.3d 183 (2008).

of Appeals, Second Circuit, concluded that VCCR does not provide a private right of action that would entitle a detained foreigner to seek damages. In its discussion of the jurisprudence of the ICJ, particularly the *Avena* and *LaGrand cases*, it confirmed that

> [i]n contrast to the "great weight" we must provide the views of our Executive, the Supreme Court has instructed that we "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Breard*, 523 U.S. at 375. We are not bound either to give that interpretation any particular weight when considering the text and context of a treaty, or to treat it as having any dispositive effect in the event of ambiguity. Accordingly, the "respectful consideration" owed to the interpretation of an international court is similar to our treatment of, inter alia, agency opinion letters and enforcement manuals … That is, the interpretation of the international court is "entitled to respect … but only to the extent that [it has] the power to persuade" … "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control".[386]

This short passage probably summarises in the best manner the authority of decisions of the International Court of Justice in the absence of any explicit legal framework governing their status and effect in internal municipal legal regimes.

Finally, municipal courts considered, in a limited manner, the status of advisory opinions in internal legal systems. The *Nuclear Weapons Opinion* was perceived as an "authoritative interpretation" of the Hague Regulations.[387] The High Court for England and Wales accorded this opinion "great respect",[388] while the Scottish High Court of Judiciary recognised it should take full account of it.[389] Yet, for an American court the *Headquarters Agreement Opinion* was "a persuasive statement".[390]

386 *Ibid.*

387 *Dow Chemical case*, at 120.

388 *Hutchinson case*, ¶ 12: "When we turn to the opinion of the International Court of Justice, which we have been taken through in great detail and which, of course, we approach with great respect".

389 *Lord Advocate's Reference case*, ¶ 66: "it is this court's function to reach its own conclusions as to the rules of customary international law, taking full account of, but not being bound by, the conclusions reached by the International Court of Justice".

390 *US v. PLO case*, fn. 18.

Final conclusions

The initial inspiration for this book was Lauterpacht's paradigm expressed as early as 1929 that municipal courts along with international tribunals administer international law simultaneously.[1] The presented case-law of the World Court and municipal courts proves that both those pillars of international law function properly and complementarily within the international legal regime. On the one hand, the International Court of Justice "remains at the apex" of the international judiciary as a first tribunal of the universal jurisdiction.[2] Although its primary role concentrates on the peaceful resolution of international frictions and disagreements, nevertheless it has predominantly contributed to the clarification of some major ambiguities of international law and, consequently, participated in its gradual development. Municipal courts, on the other hand, play a role that should not be overlooked as they interpret international norms and apply them to actual circumstances, almost on a daily basis. They adjudicate international claims and assess the legality of domestic acts in the light of international duties. They develop international law by the constant and systematic determination of international legal issues.

Interestingly, recent decades have brought international and municipal courts much closer together and induced meaningful cooperation. This holds true also for the International Court of Justice and domestic judicial organs as they engage actively in an inter-judicial dialogue, particularly on the normative level. The recent practice of the Court emphasises that the ICJ is more frequently engaged in this dialogue. Starting from the 1990s, probably with the end of the Cold War and due to the impact of globalisation and internationalisation, the World Court has expanded its jurisprudence to also accommodate references to and analysis of external judicial organs and their pronouncements. This new trend may be attributed to the structural feature of international law, in which judicial decisions, including municipal ones, are a subsidiary source of law. Although Article 38 of

1 Lauterpacht H., *Decisions of Municipal Courts as a Source of International Law*, 10 British YIL 65, 95 (1929).

2 Higgins R., *Keynote Address: A Just World under Law*, 100 Proceedings of the Annual Meeting (ASIL) 388, 390 (2006).

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the ICJ Statute places them on an equal footing with the doctrine of international law, the role of courts' rulings is much more emphasised in practice as the Court almost never refers to the writings of the most prominent representatives of the academic community. Furthermore, as sources of international law, domestic judicial decisions contain genuine determinations on the substance of international law, particularly the customary rules, that enjoy to some extent an authoritative value. But they offer more to the ICJ than the service of an intermediary as a subsidiary means of determination of international law. They assist in treaty interpretation and help with procedural issues. Moreover, the ICJ recognises, though indirectly, that the judicial activity of national courts may be distinct from State conduct and thus enjoy some special status, also in relation to implementing its decisions and providing remedies for international law violations. Finally, municipal judicial pronouncements are also subject to the scrutiny of the Court as a manifestation of a State's conduct.

Likewise, ICJ decisions are referred to and consulted by municipal courts as authoritative statements of international norms. It has also been recognised in several instances that international decisions of the Court may be enforced through domestic judicial channels. Nevertheless, the presented practice of the domestic courts suggests they choose reception over enforcement as a preferred channel of inter-judicial dialogue. In this context, an important question is why municipal courts willingly and voluntarily engage in this inter-judicial dialogue with the International Court of Justice. Although it is not the aim of this monograph to provide a comprehensive answer, certain conclusions from the realms of law, sociology of law, and public policy are, however, warranted.

Firstly, as was already stated in previous chapters, international law and Article 94(1) of the UN Charter in particular obligate States to comply with the decisions of the ICJ. In this context, a State shall be understood as a whole, as the international compliance obligation is not directed towards any particular type or kind of State organ or organs. This principle, relating almost to all international obligations incumbent on States, is, however, a double-edged sword, particularly for those arguing that municipal courts are not obligated under international law to act in conformity with ICJ decisions. On the one hand, a State confronted with a judgment of the International Court of Justice requiring certain actions or inactions may choose its own means and mechanisms available under domestic law to fulfil its international obligations.[3] It may create new legal institutions or utilise existing legal procedures or venues. This choice is left predominantly to the State's municipal law and the constitutional rules pertaining to the competence of different branches of government. On the other hand, a State may not refer to its

3 Under international law States enjoy freedom of choosing means and modes of compliance with international law and, consequently, with international rulings. Nevertheless, this freedom is not unrestricted and may be limited by the character of a violation or the character of appropriate remedy; e.g. in situations when international law requires a procedural remedy within the judicial system, as in the *Avena case*, the scope of possible methods of implementation for a State is not so wide.

domestic law as a justification for non-compliance with ICJ decisions.[4] According to Art. 4(1) ARSIWA, "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions". The judicial organs are mentioned explicitly and both the international jurisprudence[5] and doctrine[6] are unanimous as to the fact that municipal courts' rulings or the conduct of national adjudicators may give rise to State responsibility under international law. Therefore, in practice, pronouncements of the World Court are "not without effect"[7] for all organs of a State,[8] and all of them, including courts of law, are bound to comply. Any failure to do so shall be deemed a wrongful act under international law and no defence of domestic law justifies this wrongfulness.

Furthermore, the existing jurisprudence of the World Court provides for special status and obligations of municipal courts in relation to rulings of the Court. The Permanent Court of International Justice in its famous *Chorzów Factory case* laid down the principle that domestic courts are not competent to invalidate an international judgment.[9] According to Reisman, "[f]rom this one may infer that a municipal court *may not act* contrary to an I.C.J. judgment".[10] Additionally, it was acknowledged already in 1907 during the Second Peace Conference in The Hague that "within the limits of their competence, the organs of the State should ensure that the State comply with an international judgment binding on that State".[11]

Besides, it goes without question that decisions of the ICJ are final and binding upon a State party to a relevant proceeding. The answer might not be so obvious in relation to its internal organs, including courts, but this prospect is not excluded

4 VCLT, Art. 27; ARSIWA, Art. 32.

5 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body, 12 October 1998, WT/DS58/AB/R, ¶ 173; *Immunity of a Special Rapporteur Opinion*, ¶ 62 and 63.

6 Crawford J., *State Responsibility. The General Part*, Cambridge University Press 2013, p. 121; Anzilotti D., *Cours de droit international*, Pantheon Assas 1999, p. 479; Momtaz D., *Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority* [in:] *The Law of International Responsibility*, eds. Crawford J., Pellet A., Olleson S., Oxford University Press 2010, p. 239; Lauterpacht H., *supra* fn. 1, p. 84.

7 Sossai M., *Are Italian Courts Directly Bound to Give Effect to the Jurisdiction Immunities Judgment?*, 21 Italian YIL 175, 180 (2011).

8 Oellers-Frahm K., *Article 94* [in:] *ICJ Statute Commentary,* p. 194; Guillaume G., *Enforcement of Decisions of the International Court of Justice* [in:] *Perspectives on International Law*, ed. Jasentuliyana N., Kluwer Law International 1995, p. 287; Jenks C.W., *The Prospects of International Adjudication*, Stevens & Sons Limited 1964, p. 714 and Gattini A., *Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes* [in:] *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, eds. Fastenrath U., et al., Oxford University Press 2011, p. 1172.

9 *Charzów Factory case*, p. 33: "If the Court were to deny the existence of a damage on the ground that the factory did not belong to the Oberschlesische, it would be contradicting one of the reasons on which it based its Judgment No. 7 and it would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible".

10 Reisman W.M., *The Enforcement of International Judgments*, 63 AJIL 1, 19 (January 1969).

11 Mosler H., *Supra-National Judicial Decisions and National Courts*, 4 Hastings ICLR 425, 426 (1980–1).

by any international norm. It is clear, however, that a State is internationally responsible for a wrongful act in the form of non-compliance with an international decision and relevant treaty provisions requiring compliance. Similarly, actions and omissions of its organs as well lead to the responsibility for breaching international law through the attribution rule. Thus, it seems unclear and unreasonable to be of the opinion that at the same time international decisions are not binding on courts as State organs and that their non-compliance is an internationally wrongful act. Therefore, the responsibility of a State for non-compliance with decisions of the ICJ by its courts correlates with their obligation to comply as a matter of international law.

In relation to the more theoretical discussion of the law on State responsibility, the pragmatic approach of municipal courts reveals that deference to the jurisprudence of the World Court may be supported by a utilitarian argument. It is prudent, from the perspective of national adjudicators, to adhere to the interpretation of international law rendered by an international tribunal; otherwise there exists a possibility of exposing its own State to claims and subsequent international proceedings. In such a situation, it is highly likely that any international court would uphold,[12] as the example of the Consular triad indicates, its previous position on the point of law concerned. This utilitarian approach is best illustrated in the attitude of the German Federal Constitutional Court:

> For States not involved in the proceedings, the judgments of the International Court of Justice have a guiding effect (*Orientierungswirkung*) due to the interpretative authority in construing the Convention … In fact, the State parties must avoid a future determination of violations of the Convention against them, thus follow the judgments handed down against other States.[13]

Consequently, municipal courts often seem compelled to respect decisions of the ICJ in order to avoid and minimise the risk of being engaged in a wrongful act.

Secondly, the concept of a State under the State responsibility law and its current developments should be discussed in more detail. The recent jurisprudence of the World Court and a general trend in international law indicate that the traditional black-box theory of a State under international law is slowly withering.[14] Under this doctrine, a State from the perspective of international law is perceived as an entity – or a black-box. The international legal system may require certain behaviours or outcomes from this box but does not control mechanisms and

12 Although a judgment in a dispute between State A and B is binding only between these States, "if the same legal point were to arise between States C and D, the International Court would of course make the same finding of law", *see*: Higgins R., *Changing Position of Domestic Courts in the International Legal Order* [in:] Higgins R., *Themes & Theories*, ed. Rogers P., Oxford University Press 2009, p. 1344.

13 *German Consular Notification case*, ¶ 61.

14 Ferdinandusse W., *Out of the Black-Box? The International Obligation of State Organs*, 29 Brooklyn JIL 45, 48 (2003–4).

processes within a State. It binds a State as a whole but does not "pierce the veil" of a State and is not directed to its organs. Nevertheless, this concept has faced fierce critique. Lauterpacht, for example, argued that

> [t]o say that the State – and the State only – is the subject of international duties is to say … that international duties bind no one; it is to interpose a screen of irresponsibility between the rule of international law and the agency expected to give effect to it.[15]

Modern scholarship of international law tends to erode the traditional black-box theory. Rosenne, while considering the binding effect of decisions of the International Court of Justice upon States, concluded that "the decision is binding upon all the organs of the State".[16]

Furthermore, the attitude of the Court itself also points in the direction of abandoning the doctrine. In *Provisional Measures in LaGrand case*, the ICJ determined the obligations of the certain internal organs of the United States rather than treating the USA as a monad:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; … whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; … whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[17]

Additionally, when the order was not complied with as Walter LaGrand was executed, the Court did review actions of certain US organs, including the Governor of Arizona and the US Supreme Court.[18] But the *LaGrand case* is not the only example of this tendency of abandoning the black-box theory within the jurisprudence of the International Court of Justice. Similarly, in the *Immunity of a Special Rapporteur Opinion* the Court examined the practice of Malaysian courts as organs of Malaysia and found that they "had the obligation to deal with the

15 *International Law: Being the Collected Papers of Hersch Lauterpacht. Vol. I – The General Works*, ed. Lauterpacht E., 1970, p. 280, cited after Ferdinandusse W., *ibid.*, p. 54.

16 Rosenne Sh., *The Law and Practice of the International Court 1920–2005*, 4th ed., Vol. I., Martinus Nijhoff Publishers, Leiden/Boston 2006, p. 213. Similarly, Wyrozumska A., *Prawotwórcza działalność sądów międzynarodowych i jej granica* [in:] *Granice swobody orzekania sądów międzynarodowych*, ed. Wyrozumska A., Uniwersytet Łódzki 2014, p. 60.

17 *Provisional Measures in LaGrand Case*, ¶ 28 (underline added).

18 *LaGrand case*, ¶ 115: "The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order … The Court finds that the United States did not discharge this obligation".

question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*".[19] Thus, ICJ's reasoning explicitly indicates that not only Malaysia as a State but likewise its organs, namely municipal courts, are obligated under international law to recognise international immunities of functionaries of the United Nations. Surprisingly, also the addressees of *Immunity of a Special Rapporteur Opinion* seemed to recognise their role as directly bound by international legal obligations.[20] Even more importantly, this change within the jurisprudence of the World Court is attributable not to specific circumstances of the discussed cases, but rather to a conscious choice of honourable judges. According to the accounts of Judge Higgins:

> [n]or had the Court been unaware of the events within the United States that had followed its provisional measures in the Breard case. Accordingly, it decided to use some new language, in the attempt to speak across the miles directly to more of those relevant elements comprising "the state" which was the ratifying party under the Vienna Convention, and over which the Court *thus* had jurisdiction.[21]

Additionally, the ICJ is not the only international tribunal and not the first one to "speak directly to relevant actors within the State".[22] Ferdinandusse indicates that the ECJ, the ECHR, and the Inter-American Court of Human Rights all have already settled jurisprudence contradicting the black-box theory. Similarly, also international criminal tribunals seem to be heading in this direction.[23] Furthermore, even municipal courts have started recognising this shift relating to the applicability of international law and the direct binding force of international norms on State organs. In this vein, the German *Bundesverfassungsgericht* declared that:

> [t]he binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention.[24]

19 *Immunity of a Special Rapporteur Opinion*, ¶ 67(2)(b).

20 *Insas Bhd and another v. Dato' Param Cumaraswamy*, Malaysia, High Court, 7 July 2000, 121 ILR 464, 471 (2002).

21 Higgins R., *The Concept of 'The State': Variable Geometry and Dualist Perceptions* [in:] *International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saam*, eds. Gowlland-Debbas V., et al., M. Nijhoff 2001, p. 556, cited after: Ferdinandusse W., *supra* fn. 14, fn. 102.

22 Ferdinandusse W., *ibid.*, p. 80.

23 *Ibid.*, pp. 80–96.

24 *Case no. 2 BvR 1481/04,* Germany, Federal Constitutional Court, 14 October 2004, ¶ 30.

Similarly, the Supreme Court of Poland, again in relation to decisions of the ECHR, concluded that:

> Both the jurisprudence … and the legal literature … express the uniform opinion that the case-law of ECHR in Strasburg, although not producing direct effects in the sphere of national law as it does not have invalidating character but only declaratory, is, owing to the provision of Art. 46(2) of the Convention including the principle of *pacta sunt servanda*, binding for State parties to this Convention and their organs, including also courts,[25]

later to indicate that the trial court, while reconsidering the case, shall be bound by the conclusions of the ECHR in relation to the determined violations. Yet, conclusions reached in national jurisdictions relating to the ECHR and its judgements should be analogously applicable to the ICJ as both tribunals share a similar legal framework, which is further supported e.g. by the jurisprudence of the German Federal Constitution Court.[26] Consequently, the openness of domestic adjudicators to the case-law of the Court may be attributed to the abandonment of the traditional black-box theory and the shift towards direct communication with international tribunals, hence, contributing to the inter-judicial dialogue.

Thirdly, municipal courts have a special role in relation to international law as they are granted a mandate to interpret and apply its norms, as any organs of a State.

> But international law assigns to domestic courts a position more important to that of the Executive or the Legislature in the implementation of the State's international obligations. It establishes them as the "natural judges" of international law, at one and the same time the point of first contact and the last line of defence, the last opportunity for the State to comply with its international obligations.[27]

This special role is naturally rooted in the principle of exhaustion of local remedies that requires an injured private party firstly to go through the national judicial system to seek redress before bringing a claim at the international level through the diplomatic protection mechanism. Municipal courts are, thus, assigned a position of scrutinising the conduct of State authorities or lower courts in the light of international standards. They are called to interpret and apply international law to a particular set of factual circumstances. They may find a breach and provide redress within the national system of justice, consequently precluding the wrongfulness of an act attributed to a State, or reject this role and bring

25 *Case no. IV KO 103/09*, Poland, Supreme Court, 9 December 2009.

26 *German Consular Notification case*.

27 Tzanakopoulos A., *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 Loyola of Los Angeles ICLR 133, 163–4 (2011–12), p. 152.

international responsibility upon it. The local remedies exhaustion rule indeed, as Tzanakopoulos argues,[28] is the expression of the international judicial function of municipal courts and assigns to international tribunals merely a supervisory function in this regard. Consequently, domestic courts and the International Court of Justice may hold complementary roles in relation to the same dispute,[29] and their mutual engagement is an example of this inter-judicial dialogue. Due to the requirement of the exhaustion of local remedies, municipal courts are primarily responsible for considering a claim and the ICJ steps in only if they fail to act in accordance with international legal standards. This role of the World Court is subsidiary in nature as far as an international legal dispute is concerned.

This subsidiarity is present not only in the exhaustion rule, but certain branches of international legal systems provide detailed manifestations of it. For example, the *Rome Statute* explicitly expressed this rule in Articles 1 and 17 that trigger the operation of the International Criminal Court when a State is unable or unwilling to carry out the investigation or prosecution of international crimes. Human rights tribunals have created and extensively applied the doctrine of the margin of appreciation in order to recognise the preliminary role of domestic authorities, including courts, to choose between permissible interpretations of international standards.

Fourthly, international legal norms are often vague, ambiguous, and unclear as States are ready to leave certain issues unresolved or not settled in order to minimise the cost of protracted negotiations, to increase the adherence and accession to an international instrument, to facilitate the ratification process, or to reduce the risk of treaty termination. Certain matters, therefore, are left to be governed by customary norms, by practice of States, or to be determined by international judiciary, if a dispute arises. In this context, the role of international tribunals is indeed normative,[30] whether they are perceived as engaging in law-making or only law-determining or rather law-interpreting or law-clarifying. Notwithstanding, it goes without question that the function of international tribunals within the international legal system is obviously significant and normative in character due to the lack of a centralised legislative authority. The decisions of any courts are not only declaratory as to the contents of law, but also constitutive of it.[31] International tribunals may extend the application of certain rules or entire bodies of law onto an additional field of international relations. They sometimes give developed or even new meaning to well-established norms. Moreover, by the application of general rules, they fill in legal lacunae. When one takes into account the fact that international law is multicultural, multilingual, and vague, its mere interpretation is much more than law-determining. It is leading to the development or even modification

28 *Ibid.*

29 Nollkaemper A., *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5 Chinese JIL 301, 317 (2006).

30 Wyrozumska A., *supra* fn. 16, p. 5.

31 Tzanakopoulos A., *supra* fn. 27, p. 135.

of norms. Another facet of current international law is that it has moved from being a network of specific bilateral contractual relations between States to being more legislative in character as multilateral norms of general application are being adopted and implemented more frequently.[32] This shift from contract-like treaties to statutory international agreements particularly affects municipal courts.

Although the decisions of the International Court of Justice are not sources of international law and should not formally be perceived as such, nevertheless this does not mean that the ICJ is not actually involved in the law-making process that in fact is normally known under the less controversial name of the development of international law. This development by the Court occurs predominantly either in its determination that a particular norm is of customary character or in the interpretation of treaty provisions, particularly in so-called dynamic interpretation.[33] It has been acknowledged by the ICJ in its jurisprudence and described in the following terms:

> there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.[34]

As Shany rightly observed, this function of the World Court in the realm of international law development does not find any support in constituent documents of the ICJ. Notwithstanding,

> one may trace this notion to the ideological persuasions of the nineteenth century. The "gentle civilizers" of the nineteenth century subscribed not only to legal liberalism and positivism, but also to a belief in the progressive, civilizing power of international law and of international judicial institutions.[35]

Consequently, the principal attainment of the Court is "rendering of a growing collection of rules and practices constituting a single normative system".[36] Within their judicial function, municipal courts draw from this normative system established by the jurisprudence of the International Court of Justice.

Fifthly, from the perspective of both international public law and the constitutional law of each State, the judicial and enforcement processes are one of the

32 Ferdinandusse W., *supra* fn. 14, p. 104.

33 Oellers-Frahm K., *Lawmaking through Advisory Opinion?*, 12 German LJ 1033, 1053–4 (2011), p. 1040.

34 *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment, 2009 ICJ Rep. 213, ¶ 64.

35 Shany Y., *Assessing the Effectiveness of International Courts*, Oxford University Press 2014, p. 168.

36 *Ibid.*, p. 185.

basic manifestations of the sovereignty of that particular State on territory it controls. Nevertheless, it is rightly argued that on the international plane no such supreme sovereign exists. The international system is still based on the model of cooperation of equal sovereigns without any superior power. But this does not mean that international tribunals lack any link with this State sovereignty whatsoever. The jurisdiction of the International Court of Justice is based upon the consent of State parties, expressed in whatever form, in advance or *post factum*. This consent is the manifestation of the sovereignty of a State that through this consent subjugates itself to international adjudication and in fact transfers part of its sovereignty to the international tribunal, but only to the extent laid down in this consent. This mutual transfer of sovereignty is the socio-legal basis for the jurisdiction of the International Court of Justice, which correlates with the obligation to comply with the outcomes of the case. Thus, the ICJ, in a limited sense, is exercising a sovereign power over the State-parties to the proceedings, but it is not the World Court's power, but that of the litigants. Consequently, it may be even argued that the judicial function of both the municipal courts and international tribunals is rooted in the same sovereign power that manifests itself in the same way but through different channels. Due to this similarity, municipal courts may be willing to refer to and acknowledge the determinations of their international counterparts.

Sixthly, decisions of the International Court of Justice in cases relating to the interpretation and implementation of multilateral treaties may be perceived by the stakeholders of the international community and municipal courts as an official or authentic interpretation of those instruments. State parties in many international arrangements bestow upon the ICJ certain competences to resolve disputes pertaining to construing and applying those agreements in either special, compromissory clauses[37] or in additional agreements, often called optional protocols. This implies that the Court is perceived as an authoritative interpreter of the treaties and an interpretation rendered in the process of settling a dispute should be given such a weight, as if the parties themselves concluded it. Moreover, it may be argued that the binding force of a treaty deriving from the consent of State parties extends over any later ruling of international tribunals equipped with the competence to interpret it and settle controversies.[38] Once such an interpretative decision is rendered, a State and its judicial organs shall apply an agreement in accordance

37 For more about those types of treaty clauses, *see*: Collier J., Lowe V., *The Settlement of Disputes in International Law*, Oxford University Press, pp. 137–9 and especially Charney J., *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 83 AJIL 85 (1989).

38 Schreuer Ch., *The Authority of International Judicial Practice in Domestic Courts*, 23 ICLQ 681, 689 (October 1974). Additionally, the dissent of Justice Breyer is also illuminating in this regard: "The answer to Lord Ellenborough's famous rhetorical question, 'Can the Island of Tobago pass a law to bind the rights of the whole world?' may well be yes, where the world has conferred such binding authority through treaty … It is this kind of authority that Torres and Mexico argue the United States has granted to the ICJ when it comes to interpreting the rights and obligations set forth in the Vienna Convention", *see*: *Torres v. Mullin*, 540 US 1035 (2003) (Breyer, diss.).

with an international decision[39] providing clarification concerning an international instrument. It is even argued that interpretative judgments form part of the directly applicable treaty provisions.[40] Consequently, municipal courts

> normally adopt the interpretation of the Court as the official and authoritative meaning of the provision in question. The legal formulation to be given to this fact does not matter. Of significance is the intention to contribute to the uniform application of the rights guaranteed by the Convention in all member countries.[41]

Seventhly, in the international law scholarship it has been maintained for many years that ICJ decisions, or at least some of their categories, enjoy much broader significance than limited by the principle of *res judicata* spelled out in Article 59 of the ICJ Statute. This approach was advanced by Rosenne, who argued that "when *res judicata* refers to the territory or the status of a State, although the judgment *qua* judgment is binding only on the parties, it is effective *erga omnes*, for all other States".[42] Besides the title to territory when determined by the ICJ, this *erga omnes* character shall also extend to cases relating to the validity of the land and maritime delimitation, jurisdictional rights, right of passage over foreign territory, or right to fly the flag of a specific State, and nationality of persons and companies.[43] A similar conclusion may be reached in relation to the interpretation of multilateral treaties.[44] But it is not only decisions of international tribunals specifying the content of customary norms and interpreting international treaties that may have an *erga omens* character. Such an effect may also be attributed to international pronouncements determining in general terms remedies for a breach of international obligations.[45] In any case, judicial decisions of international tribunals, including the International Court of Justice, creating an objective situation,[46] whether in facts or in law, shall not be limited by the strict *inter pares* binding

39 Mosler H., *supra* fn. 11, p. 461 and Hoppe C., *Implementing of LaGrand and Avena in German and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EJIL 317, 318 (2007).

40 *The Integration of International and European Community Law into the National Legal Order. A Study of the Practice in Europe*, ed. Eisemann P.M., Kluwer Law International 1996, p. 457.

41 Mosler H., *supra* fn. 11, pp. 469–70.

42 Rosenne Sh., *supra* fn. 16, p. 209 (underlines added).

43 Mosler H., *supra* fn. 11, pp. 439–40

44 Bernhardt R., *Article 59* [in:] *The Statute of the International Court of Justice. A Commentary*, eds. Zimmermann A., et al., Oxford University Press 2006, p. 1240.

45 Nollkaemper A., *Internationally Wrongful Acts in Domestic Courts*, 101 AJIL 760, fn. 82 (2007).

46 Bedjaoui M., *The Reception by National Courts of Decisions of International Tribunals*, 28 NYU-JILP 45, 52 (1996–6) and Bernhardt R., *Article 59* [in:] *The Statute of the International Court of Justice. A Commentary,* eds. Zimmermann A., et al., Oxford University Press 2006, p. 1247. In this regard, it is even argued that advisory opinions *per se* have such a character: "there is no question but that an advisory opinion states the law at large, *erga omnes*", *see*: Rosenne Sh., *supra* fn. 16, p. 1699.

effect and shall be respected by the international community and all States and their organs, including municipal courts.

Despite this consideration on the side of academia, there are also explicit signs that the International Court of Justice has recognised the *erga omens* character of its decision, at least in regard to determinations on the interpretation of multilateral treaties. In the *Aegan Sea Continental Shelf case*, it observed that:

> [a]lthough under Article 59 of the Statute "the decision of the Court has no binding force except between the parties and in respect of that particular case", it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey.[47]

This approach has been further advanced in the *Aerial Incident case*[48] and argued even previously in dissenting opinions of ICJ judges.[49] Additionally, the *erga omens* character of certain decisions of the ICJ is rightly illustrated in the extended application of ICJ decisions, or the doctrine of the impermissibility of an *a contrario* contention,[50] incorporated into the jurisprudence of the World Court and its practice in the minority opinion in the *LaGrand case*[51] and later by the majority in the *Avena case*. As Rosenne rightly observed, "[t]he effect of this is that an interpretation of a multilateral convention in a judgment in a bilateral dispute will apply generally, although the application of that interpretation will remain a bilateral matter between the parties to the litigation".[52] It needs to be highlighted that State parties to a particular treaty, but not involved in a specific dispute brought before the ICJ, are not left without any instruments to influence the interpretation of a treaty to be rendered by the World Court, or at least to present their official position in this regard. The procedural safeguard is envisaged in Article 63 of the ICJ Statute that governs the intervention into on-going proceedings. In this

47 *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment, 1978 ICJ Rep. 3, ¶ 39.

48 *Aerial Incident case*, ¶ 26.

49 *Nottebohm case*, p. 61 (Judge Guggenheim, diss. op.): "The scope of the judicial decision extends beyond the effects provided for in Article 59 of the Statute"; *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment, 1978 ICJ Rep. 3, 47 (Judge Singh, sep. op.): "in the context of administering inter-State law wherein the Court's observations, despite Article 59 of the Statute, could easily create implications in the relations between States including even those not before the Court".

50 Rosenne Sh., *supra* fn. 16, p. 1576.

51 *LaGrand* (Germany v. USA) Judgment, 2001 ICJ Rep. 466, 517 (President Guillaume, declaration): "Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph".

52 Rosenne Sh., *supra* fn. 16, p. 1577.

context, the official perception of the effect of decisions of the European Court of Human Rights is similar.[53]

Equally, also certain municipal courts seem to recognise this wider effect of the Court's case-law. In the *Albers case* the Italian Court of Cassation found it was not directly obligated to follow the *Jurisdictional Immunities* judgment as the criminal proceedings relating to the San Terenzo Monti massacre and being examined by the *Cassazione* were not among those brought by Germany to the World Court. Nevertheless, it respected ICJ's pronouncement also in that case by granting Germany immunity. Amoroso in relation to the Italian judicial decision expressed that "it would be nonsense if the ICJ's ruling concerned only the proceedings explicitly referred to in Germany's application, leaving Italy free to violate its immunity in all other cases".[54] This attitude of the municipal court may be perceived as a sign of recognition of the extended application of decisions of the ICJ.

Eighthly, the binding force or persuasiveness of ICJ decisions in the eyes of municipal courts may be rooted in the doctrine of issue preclusion. Developed in the common law, it provides that legal matters already adjudicated by a competent court of law shall not be reopened before another court, even between different parties.[55] In this context, any legal matter already settled by the International Court of Justice in its decision might not be re-examined by municipal courts, but rather applied as decided by the ICJ. This approach was embraced by some American courts as they relied on the *Teheran Hostages case* determinations made by the International Court of Justice and applied them in domestic proceedings.[56]

Ninthly, the willingness of municipal courts to refer and receive decisions of the International Court of Justice may also be attributed to the difference in sources of law at international and domestic levels. Normally, national judges have to deal with a written letter of law, either in the form of a statute or a previous judicial decision. Thus, the literal interpretation is a predominant, but not the only, tool of judicial activism at the domestic level. As a similar approach is possible in relation to treaty norms, it is not methodically feasible as far as customary rules and general principles of law are concerned. Those types of norms

53 The stance of the Parliamentary Assembly of the Council of Europe runs as follow: "[t]he principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omens* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice", *see*: Council of Europe, Parliamentary Assembly, *Execution of Judgments of the European Court of Human Rights. Resolution 1226 (2000)*, 28 September 2000, ¶ 3.

54 Amoroso D., *Military Prosecutor v. Albers and Others and Germany*, 9 August 2012, Court of Cassation, Italy, Case no. 32139/2012, ILDC 1921 (IT 2012), A6.

55 Schulte C., *Compliance with Decisions of the International Court of Justice*, Oxford University Press 2004, Chapter 2, fn. 283.

56 Reilly D.M., Ordonez S., *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 New York University JIL and Politics 435, 459–60 (1995–6).

are rather applicable than interpretable in the adjudication.[57] National courts are not experienced or best suited to determine their existence and scope. Thus, they turn to the jurisprudence of international tribunals to assist them in their task of applying international law.

Benvenisti highlights that a resolution of *Institute de Droit International* concerning the role of national judges within the international legal regime[58] encourages them to become "independent actors in the international arena, and to apply international norms impartially, without deferring to their governments".[59] It also calls upon domestic adjudicators to work closely with international tribunals in the realm of international law, rather than with their national executives.[60] This shift from the politicisation to the judicialisation of international law seems to be based on the similarities shared by both municipal and international judicial bodies in their function, operation, and characteristics.

Tenthly, another shift within current international politics and law is signalled by the legalisation and already mentioned judicialisation of international relations.[61] The former shall mean both the significant abundance of international norms and the noteworthy increase in the actual recourse to these rules in governing relations between different subjects of international law.[62] The later connotes the significant proliferation of international dispute settlement institutions and the frequency of submitting international frictions to them.[63] The effect of those processes leads to a situation where

57 Gourgourinis A., *The Distinction between Interpretation and Application of Norms in International Adjudication*, 2 J. of International Dispute Settlement 31, 36 (2011).

58 Institute de Droit International, *Resolution. The Activities of National Judges and the International Relations of Their States*, Milan, 7 September 1993, available at: http://www.justitiaetpace.org/idiE/resolutionsE/1993_mil_01_en.PDF (1.08.2015).

59 Benvenisti E., *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of Their State'*, 5 EJIL 423, 424 (1994).

60 Institute de Droit International, *Resolution. The Activities of National Judges and the International Relations of their States*, Art. 1(2): "in determining the existence or content of international law … should enjoy the same freedom of interpretation and application as for other legal rules, basing themselves on the methods followed by international tribunals"; and Art. 5(3): "making every effort to interpret it [treaty] as it would be interpreted by an international tribunal".

61 Bennouna M., *How to Cope with the Proliferation of International Courts and Coordinate Their Action* [in:] *Realizing Utopia. The Future of International Law*, ed. Cassese A., Oxford University Press 2012, p. 287.

62 Nollkaemper A., *The Process of Legalisation after 1989 and Its Contribution to the International Rule of Law* [in:] *Selected Proceedings of the European Society of International Law. Third Volume. International Law 1989–2010: A Performance Appraisal*, eds. Crawford J., Nouwen S., Hart Publishing 2012, pp. 90–3.

63 Paulus A.L., *From Neglect to Defiance? The United States and International Adjudication*, 15 EJIL 783, 792 (2004). Alter observes that "[o]f the twenty-five permanent ICs operational as of 2006, twenty-two (88%) have at least partial compulsory jurisdiction, seventeen (68%) allow international institutional actors to initiate binding litigation, and fifteen (60%) have provisions that allow private actors to initiate litigation. These design features explain in part why IC usage has also increased. By the end of 2009, international courts had issued over twenty-seven thousand

> courts gain authority to define what the law means and where litigation becomes a useful way to reopen political agreements. Negotiations among actors become debates about what is legally permissible, and politics takes place in the shadow of courts with the lurking possibility of litigation shaping actor demands and political outcomes.[64]

Eleventhly, the increase in judicial interactions coupled with the creation of new international tribunals and the internationalisation of domestic proceedings led Slaughter to argue for the natural development of the global community of courts encompassing both international (including supranational) and municipal adjudicators.[65] This concept has gained much recognition in the scholarship of international law and has been additionally identified as "transnational judicial conversation",[66] "international judicial system",[67] or "judicial globalization".[68]

The basis for the global community of courts paradigm is the conceptual shift

> from two systems – international and domestic – to one; from international and national judges to judges applying international law, national law, or a mixture of both. In other words, the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global legal system, but they certainly constitute a global community of courts.[69]

Consequently, it is a loose network of cooperation, rather than an organised system, that lacks subordination or hierarchy. Therefore, a community of courts does not resemble the traditional hierarchical system of justice, but is based on persuasiveness, bidirectionality, and voluntariness[70] rather than the coerciveness of authority. Those particular characteristics should be especially appealing to those judges and courts participating in and contributing to this common goal, as such

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binding legal rulings. Eighty-eight percent of the total IC output of decisions, opinions, and rulings were issued since the end of the Cold War (1989)", *see*: Alter K.J., *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, Northwestern University School of Law, Faculty Working Papers. Paper 212 (2012), available at: http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/212 (27.08.2015), p. 4.

64 Alter K.J., *ibid.*, p. 1.

65 Slaughter A.-M., *A Global Community of Courts*, 44 Harvard ILJ 191 (2003).

66 McCrudden Ch., *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 Oxford J. Legal Studies 499 (2000).

67 Martinez J.S., *Towards an International Judicial System*, 56 Stanford LR 429 (2003–4).

68 Slaughter A.-M., *Judicial Globalization*, 40 Virginia JIL 1103 (1999–2000).

69 Slaughter A.-M., *supra* fn. 65, p. 192.

70 Ahdieh R.B., *Between Dialogue and Decree: International Review of National Courts*, 79 NYULR 2029, 2052 (2004).

a step will neither strip them of their judicial power nor restrict the sovereignty of a State they represent.

Another important aspect of the theorem is the institutional and professional identity of international tribunals and municipal courts as well as their judges. It is argued that they are no longer perceived as interest-driven agents of their States, but rather "members of a profession that transcends national borders" participating in "a common judicial enterprise"[71] and "their relations are shaped by a deep respect for each other's competences and the ultimate need, in a world of law, to rely on reason rather than force".[72] Once this identity is recognised together with basic values shared by judges, including safeguarding the rule of law and fundamental rights, the judicial cross-fertilisation of ideas and solutions to a particular legal issue among courts of different types and systems is initiated and thrives. Judges of different jurisdictions and levels start getting acquainted with the jurisprudence of their foreign counterparts, citing the relevant decisions, discussing different attitudes to a concrete legal matter, a phenomenon that today is already present in the inter-judicial dialogue between constitutional courts around the world. Over time, a voluntary judicial consensus in relation to a particular issue might be reached and further duplicated. In this vein, it may be even argued that "a nascent global jurisprudence"[73] is being created, "a system of 'shared law'".[74]

Even more, it should not be ignored that nowadays courts tend to interact and communicate with other courts, both municipal and international, quasi-autonomously. This change is based on the supposition that modern international law and international relations should not be shaped exclusively by diplomats and that judges also have their role in this process. Thus, the rule of law is being fostered at the international level. Interestingly, it is acknowledged within international law scholarship that the current shift is a novelty, as it is the courts as main actors that make a difference.[75] Furthermore, municipal courts have also started to recognise their new independent position within both national and international legal systems in relation to inter-judicial cooperation, as "such cooperation presupposes an on-going dialogue between the adjudicative bodies of the world community".[76] Finally, it should be stressed that both the ECHR and the ECJ, despite significant differences in their legal frameworks, have successfully developed into supranational tribunals by overstepping the traditional and formal relations with Member States *per se*, and initiating dialogue with their internal organs, particularly

71 Slaughter A.-M., *A New World Order*, Princeton University Press 2004, p. 68.

72 *Ibid.*, p. 102.

73 *Ibid.*, p. 70.

74 Young E.A., *Institutional Settlement in a Globalizing Judicial System*, 54 Duke LJ 1143, 1232–3 (2004–5).

75 Slaughter A.-M., *A Typology of Transjudicial Communication* [in:] *International Law Decisions in National Courts*, eds. Franck Th.M., Fox G.H., Transnational Publishers 1996, pp. 60–1.

76 *Euromepa, S.A. v. R. Esmeria, Inc.*, 51 F.3d 1095, 1101 (2nd Cir. 1995).

courts.[77] It seems that the International Court of Justice and domestic judicial organs are similarly interested in following this path as the present book provides sufficient evidence in this regard.

Twelfthly, as the national case-law analysed in the previous chapter indicates, the openness of municipal courts to the jurisprudence of the International Court of Justice is dictated neither by the sense of the binding force of those decisions nor simple courtesy. This phenomenon is probably best described by the concept of judicial comity (*comitas gentium*,[78] *convenance at courtoisie international*, *Staatengunst*), the creation of courts of the common law system that has spread further over other systems. It has become an accepted practice of many domestic judicial institutions exercised both in relation to international tribunals and foreign adjudicators,[79]and it is nowadays similarly utilised and applied by international tribunals.[80] As such, it derives from an inherent competence of each court to administer proceedings justly and efficiently.[81]

The precise definition of judicial comity is, however, not easy to determine. Its traditional expression was provided by the US Supreme Court:

> "Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[82]

In other words,

> [t]he principle calls upon courts to accord deference to the authority of other courts belonging to different legal systems … It might also call upon courts to accord due consideration to the decisions of other courts and tribunals – i.e., to give effect to their decisions, unless there are cogent reasons not to do so.[83]

77 Helfer L.R., Slaughter A.-M., *Toward a Theory of Effective Supranational Adjudication*, 107 Yale LJ 273, 337 (1997–8).

78 Oppenheim clarified that *comitas gentium* is not a binding obligation, but rather a set of "rules of politeness, convenience, and goodwill", *see*: *Oppenheim's International Law*, ed. Jennings R., Watts A., 9th ed., vol. I, Longman 1992, p. 43.

79 Shany Y., *Jurisdictional Competition between National and International Courts: Could International Jurisdiction-Regulating Rules Apply?*, 37 Netherlands YIL 3, 42 (December 2006).

80 *The MOX Plant case* (Ireland v. UK), Order no. 3, 24 June 2003, ¶ 28: "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions".

81 Shany Y., *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 Israel LR 230, 245 (2005).

82 *Hilton v. Guyot*, 159 US 113, 163–4 (1985), *see also*: *Russian Socialist Federated Soviet Republic v. Cibrario*, Court of Appeals of New York, 6 March 1923, 235 N.Y. 255.

83 Shany Y., *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 Israel LR 230, 245 (2005).

The dual nature of the doctrine articulated in the fact that it is at the same time discretionary but also legally compelling[84] is probably its most intriguing characteristic that does not allow the simple categorization of the comity. It is afforded to the decisions of foreign and international courts out of deference and respect,[85] while weighing the interests of the parties.[86] Interestingly, after discussing the role of comity throughout the ages D'Alterio observes that it is rooted in a common cultural and legal heritage that has not been reflected in rigid written norms.[87] It presumes the institutional identity of courts and tribunals of different levels, jurisdictions, and systems and the basic common values shared by them, including judicial independence, due process, attachment to the rule of law, and reason rather than force.[88]

On the universal level, comity in general serves as a flexible and harmonious method of governing the coexistence and relations between different legal systems.[89] But it also has a practical dimension that allows consideration of the opinions of other jurists that have already dealt with and considered the same challenging legal issue and at least to draw from their experience. Consequently, within the academic community a default rule has been proposed, in accordance with which municipal courts considering issues of international law should take into account the jurisprudence of international tribunals and any departure from it should be conditional on the clear articulation of the reasons behind such a decision.[90]

Thirteenthly, along with the concept of judicial comity, the domestic judicial reference and deference to the jurisprudence of the International Court of Justice may similarly be justified by the persuasive authority of its decisions that is recognised and acknowledged by municipal judges. It may be best described as the "authority which attracts adherence as opposed to obliging it"[91] or "the weight accorded … out of respect for … legitimacy, care, and quality by judges worldwide".[92] The authoritative value of ICJ decisions is explicitly acknowledged

84 Paul J.R., *Comity in International Law*, 32 Harvard JIL 1, 11 (1991) explained that comity is neither "absolute obligation" nor "mere courtesy and good will" but rather "occupy[s] some intermediate space between these categories".

85 Reilly D. M., Ordonez S., *supra* fn. 56, p. 450.

86 Crawford J., *Chance, Order, Change: The Course of International Law*, Hague Academy of International Law 2014, p. 298.

87 D'Alterio E., *From Judicial Comity to Legal Comity: A Judicial Solutions to Global Disorder?*, Jean Monnet Working Paper 13/10, p. 12.

88 In this vein, Slaughter argues that "it is possible to identify several distinct strands of judicial comity. First is a respect for foreign courts *qua courts*, rather than simply as the face of a foreign government, and hence for their ability to resolve disputes and interpret and apply the law honestly and competently. Second is the corollary recognition that courts in different nations are entitled to their fair share of disputes—both as coequals in the global task of judging", *see*: Slaughter A.-M., *Court to Court*, 92 AJIL 708, 709 (October 1998).

89 D'Alterio E., *supra* fn. 87, p. 30.

90 Martinez J.S., *supra* fn. 67, p. 495.

91 Glenn H.P., *Persuasive Authority*, 32 McGill JL 261, 263 (1986–7).

92 Slaughter A.-M., *A New World Order*, Princeton University Press 2004, p. 81.

in the international law scholarship[93] and may be explained on several levels. The International Court of Justice is the only international tribunal with such a large, diverse, general, and universal jurisdiction. Its Statute does not provide for any limitation, either of a geographical or material nature. As it is opened to States only, mostly significant and rather crucial matters are referred to it for adjudication or an opinion. What is more, the Court is open to all interested States, even those not associated with the UN.[94] Thus, its circle of litigants is well diversified including superpowers and tiny island States, First and Third World representatives from all continents. This universality validates the designation of the ICJ as "an organ of international law" acknowledged in the jurisprudence of the Court[95] or "a guarantor of the unity of international law".[96] It is not a creation of any self-contained regime or a tribunal for and within a certain legal system specified geographically or otherwise.

Furthermore, this authoritative persuasiveness of the pronouncements of the ICJ may be attributed to the centrality of the Court within the United Nations' system as the principal judicial organ of the organisation.[97] It should also be taken into account that the Court draws its authority from the Charter of the United Nations, its founding document. Being the constitution of the modern international system, it has symbolic value that also extends over the Peace Palace in The Hague. Additionally, the special role of the ICJ within the UN and the international regime is highlighted by the reference to the "judicial" indicating that the World Court is "entrusted with the responsibility of issuing an authoritative determination of the bearing of international law on the dispute or legal question".[98]

93 Paust J.J., *Domestic Influence of the International Court of Justice*, 26 Denver JIL & Policy 787, 787 and 789 (1997–8) arguing that "decisions and advisory opinions of the International Court of Justice have generally been widely received as authoritative explications of international law" or "authoritative indicia of identifiable international law"; Reisman W.M., *Nullity and Revision. The Review and Enforcement of International Judgments and Awards*, Yale University Press 1971, p. 644: "an authoritative decision of the international community"; *Oppenheim's International Law*, eds. Jennings R., Watts A., 9th ed., vol. I, Longman 1992, p. 41: "the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally"; O'Connor S.D., *Keynote Address*, 96 Proceedings of the Annual Meeting (ASIL) 348, 350 (2002); Amr M.S.M., *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, Kluwer Law International 2003, p. 119; *Restatement (Third) of Foreign Relations Law of the United States*, American Law Institute Publishers 1987, p. 371; Nollkaemper A., *Conversations among Courts: Domestic and International Adjudicators*, ACIL Research Paper 2013-08, p. 18; Jenks C.W., *supra* fn. 8, p. 712; Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, p. 787.

94 Art. 93(2) of the UN Charter.

95 *Corfu Channel case*, p. 35 and *Certain German Interests case*, p. 19

96 Simma B., *Universality of International Law from the Perspective of a Practitioner*, 20 EJIL 265, 286 (2009).

97 Art. 92 of the UN Charter.

98 Falk R.A., *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AJIL 42, 48 (January 2005).

The Court's wide and diverse composition correspondingly contributes to its authoritativeness. All the main forms of civilisations together with major legal systems of our planet are represented on the bench. Judges are elected jointly by the UN General Assembly and the UN Security Council, which at least in theory, should ensure that the candidates are supported by the widest possible consent among States. Besides the professional competence enumerated in Articles 2 of the ICJ Statute, they possess the required expertise as they are recruited from academia, diplomacy, and international organisations. Thus, it is not surprising that in comparison to municipal courts, judges of the Court are specialists in international law and their decisions bear greater weight and persuasiveness.

The historical dimension of the ICJ should not be overlooked as well. It is the only international tribunal with such longevity, organic permanence,[99] and precedence in time. It dates back to 1922 and should be perceived as the direct and immediate successor of the first permanent tribunal ever created, as it demonstrates "a continuity so strong as to amount to virtual identity"[100] with the Permanent Court of International Justice. The funding documents of both the PCIJ and the ICJ are virtually indistinguishable, which is admitted in Article 92 of the UN Charter. Finally, the ICJ Statute in its Articles 36(5) and 37 provides for a direct succession of the Court of international commitments undertaken in relation to the PCIJ.

Additionally, the Court has advanced *la jurisprudence constant*[101] or the consistency of judicial decisions over time. It has been established among other things to promote justice within international affairs. But this justice "is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability".[102] Consequently, the persuasive authority of the International Court of Justice may be also attributed to its "foreseeable" jurisprudence.[103] It is interesting to note that most disputes relating to delimitation are referred to the ICJ for adjudication rather than to the ITLOS as the former has cautiously developed its case-law in this regard over the years and provides parties with a certain amount of coherence and certainty. Further to predictability and transparency of jurisprudence, it is also important to note that decisions of the World Court are not secretly kept in vaults of the Peace Palace, but are available to the public at large, which contributes to its broad familiarity. The persuasive authority of pronouncements of the International Court of Justice is also evident in its relations with other international tribunals, as the reliance on case-law of the Court is not only a domain of national courts. They, including the

99 Rosenne Sh., *supra* fn. 16, p. 1553.

100 Berman F., *The International Court of Justice as an 'Agent' of Legal Development?* [in:] *Realizing Utopia. The Future of International Law*, ed. Cassese A., Oxford University Press 2012, p. 9.

101 Rosenne Sh., *supra* fn. 16, p. 1574, fn. 175.

102 *Continental Shelf* (Libya v. Malta), Judgment, 1985 ICJ Rep. 13, ¶ 45; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgment, 1993 ICJ Rep 38, ¶ 58.

103 Wyrozumska A., *supra* fn. 16, p. 71.

Inter-American Court of Human Rights, the WTO Appellate Body, the Iran-US Claims Tribunal, and the Court of Justice of the European Union,[104] treat the jurisprudence of the ICJ with deference and consult it, when necessary.

Fourteenthly and finally, some prominent scholars argue that the International Court of Justice, regardless of the legal framework of the Court, occupies a primary position in relation to other courts and tribunals, domestic and international, as far as international matters are concerned.[105] Pinto stresses even that the drafters of the ICJ Statute might have opted for an evolutionary development and thus set the stage for "a future hierarchy" by describing the ICJ as the *principal* judicial organ rather than *the* judicial organ. Consequently, "the Court is placed constitutionally and unalterably at the apex of a judicial pyramid of evolving complexity".[106] Municipal courts may, consequently, examine and utilise the case-law of the ICJ due to its supreme status in relation to international legal issues.

These few reasons constitute a reasonable and conceivable justification for the inter-judicial dialogue on the side of municipal courts. Nevertheless, the presented list of possible justifications is not exhaustive, as the aim of the present author was to describe and analyse the practical and empirical aspects of the inter-judicial dialogue phenomenon in the first place and sketch possible theoretical issues for further research. On this basis, it is reasonable to conclude that the relations between the International Court of Justice and domestic courts are intensifying and to infer that those relations shall develop even further in the coming decades. In this context, despite evident legal differences, some analogies with the former European Court of Justice may be drawn. In fact,

> the text of the Treaty of Rome neither specifies any particular domestic mechanism to enforce ECJ judgments nor does the Treaty, or any subsequent treaties, establish the domestic legal status of European law in general. Instead, the doctrine of direct effect and the eventual supremacy of European

104 Higgins R., *The ICJ, the ECJ, and the Integrity of International Law*, 52 ICLQ 1, 19 (January 2003).

105 Dupuy P.-M., *The Unity of Application of International Law at the Global Level and the Responsibility of Judges*, 1 European J. of Legal Studies 29, 36 (2007) and Cancado Trinidade A.A., *Exhaustion of Local Remedies in International Law and the Role of National Courts*, 17 Archiv des Völkerrechts 333, 335 (1978) describing that the ICJ holds "primacy in the determination of international issues throughout the international litigation".

One author even claims that the ICJ has achieved within the international legal regime a position comparable with the one of supreme courts in national systems and is referred to as a Global Court: "By going beyond the Charter and the Statute, the Court is becoming a global Court, widening its functions and powers. It is involved in the protection of human rights and the maintenance of peace. It asserts its power of judicial control over the UN political organs, standing as the 'ultimate guardian' of the constitutive principles of the emerging international global community", *see*: Capaldo G.Z., *The Pillars of Global Law*, Ashgate 2008, p. 133.

106 Pinto M.C.W., *Pre-Eminence of the International Court of Justice. Presentation* [in:] *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, eds. Peck C., Lee R.S., Martinus Nijhoff Publishers 1996, p. 283.

> law were established by judgments of the ECJ itself in conjunction with the domestic courts of European member states … the rise of Europe as a single legal community was not led by the member states via political and diplomatic negotiations; rather, the rise of a Europe-wide law can be attributed more to the ECJ than to any other institution.[107]

The same is possible, although differently in scope, for the system of international law, once inter-judicial cooperation has been initiated[108] and consciously led.

This role of the International Court of Justice and domestic adjudicators within the international legal environment coupled with their increasing cooperation is both advantageous and indispensable for the international system. It may be perceived as an answer to the issue of fragmentation of international law as a contribution factor to the coherence and uniformity of international obligations.[109] Additionally, due to the lack of centralised legislative powers vested with a defined organ at the international level, the net of cooperation between judicial departments may be the most effective mechanism of adapting the general rules of international law to the modern challenges of the international community.[110] It is also rightly argued that

> the judicial dialogue between municipal and international courts constitutes a unique system of equilibrium, checks and balances, preventing on one hand the international jurisprudence created in isolation from the adjudicating practice and the value system generally accepted in States, and on the other hand making it difficult for the international legal system to "anarchize" through putting excessive weight on isolated practice of international law application.[111]

107 Ku J.G., *International Delegations and the New World Court Order*, 81 Washington LR 1, 39 (2006).

108 Within the international legal scholarship, it has been voiced, not without merits, that municipal courts in fact play a comparable role within the international legal system as they do in the EU law regime, particularly in relation to the direct effect doctrine, *see*: Nollkaemper A., *The Direct Effect of Public International Law* [in:] *Direct Effect. Rethinking Classic of EC Legal Doctrine*, eds. Prinseen J.M., Schrauwen A., Europea Law Publishing 2002, p. 179.

109 Benvenisti E., Downs G.W., *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EJIL 59, 68 (2009): "The newly acquired tools for inter-judicial co-ordination and co-operation hold out the possibility that national courts may be able to play an important collaborative role in helping international courts create a coherent web of linked obligations out of the cacophony of atomistic and often conflicting treaties which currently composes international law".

110 Pellet A., *Article 38* [in:] *ICJ Statute Commentary*, p. 790: "It remains that, in the absence of a world legislator, there is no exaggeration in thinking that the Court, limited as it is by the hazards of its seising, is one of the most efficient, if not the most efficient, vehicle for adaptation of general international law norms to the changing conditions of international relations".

111 Kaszubski M.P., *Reakcja sądów krajowych na dynamiczną wykładnię prawa międzynarodowego* [in:] *Granice swobody orzekania sądów międzynarodowych*, ed. Wyrozumska A., Uniwersytet

The current practice of inter-judicial dialogue between the International Court of Justice and municipal courts may have yet another dimension. So far, the process of development and codification of international law has been mostly advanced by the UN International Law Commission, certain general resolutions of the UN General Assembly, and newly concluded treaties. Besides this road, constant normative communication between national and international judges may also be a tool in the development of international law. A tool deprived of politicisation, self-interest, and bargaining, but concentrated on the international rule of law. This picture might be somewhat idealistic, but at the same time it seems to be the better option.

To conclude, according to the US Supreme Court,

> [i]nternational law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality.[112]

This jural quality is, thus, indispensable for international law to possess the quality of law and to develop it into a more coherent body of norms. The inter-judicial dialogue between the International Court of Justice and municipal courts provides for this quality at all levels.

Łódzki 2014, p. 236, available at: http://wpia2.uni.lodz.pl/zeupi/Publikacje/Anna_Wyrozumska_red_Granice_swobody_orzekania_sadow_miedzynarodowych.pdf (5.01.2015).

112 *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934).

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